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Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-389

No. 74-428

ALBERMARLE PAPER CO., *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

HALIFAX LOCAL 425, PAPERMAKERS AND PAPERWORKERS, *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED OCTOBER 7, 1974 AND OCTOBER 15, 1974 CERTIORARI GRANTED DECEMBER 16, 1974

In The

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-389

No. 74-428

Albermarle Paper Co., *Petitioner*

v.

Joseph P. Moody, et al., *Respondents*

Halifax Local 425, Papermakers and Paperworkers, *Petitioner*

v.

Joseph P. Moody, et al., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PLAINTIFFS' EXHIBIT NO. 1

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-276 Filed May 9, 1966]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Joe P. Moody. I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 1, Box 128, Roanoke Rapids, N. C. My complaint is against Halifax Local No. 425 AFL-CIO whose address is ..... I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training and/or experience.) I received a primary education and have 14 years of experience Albermarle Paper Mfg. Co.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

The above named union, which is a bargaining agency for most of the employees in the Albemarle Paper Mfg. Co., including myself is guilty of discriminating against Negroes in upgraded employment. According to the guidelines of progression in Labor Management Agreement, Halifax Local No. 425 discriminates against Negroes in progression of policy making staff. There are no Negroes on the negotiating staff. Negroes are not protected by the union

in upgraded employment according to seniority in that no Negroes have been placed in any position according to Guidelines, page 16, entitled "Seniority."

We have been refused redress of grievances by union management.

1. Negroes are not permitted in meetings where negotiations of grievances are in question.

2. During incliment weather, Negroes have to crawl under flat cars without proper equipment to protect our bodies. Whites are not required to do this and they are furnished adequate clothing by the paper mill.

The union conspires with the company to discriminate against Negroes.

Negroes have been refused copies of the new wage agreement by the union and are paid salaries below that of Whites performing the same type duties. For instance: Negroes must perform any and all jobs requested of them, including operating bulldozers, repairing cranes, etc., which are jobs that pay up to $3.00 per hour. We are classified and paid as laborers of $2.39 per hour.

/s/ Joe P. Moody
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-277]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Joe P. Moody Age: ..... I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 1, Box 128, Roanoke Rapids, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I received a primary education and have 14 years of experience with the above named company.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

I have been on my present job for twelve years. No. 1 chipper has had a promotion within a certain area. Whites have been hired and placed in positions above me. Also one Negro.

I am forced to repair chains, which is a mechanics job, at a salary of $3.00 per hour to $3.12 per hour, and my salary range is from $2.36 to $2.42 per hour. In the light of these facts, Halifax Local No. 425 is discriminating

against Negroes in employment, according to page 16 of the Guidelines.

/s/ Joe P. Moody
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-283]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My Name is Arthur Mitchell, Age: ..... I am a Negro citizen of the United States and a resident of North Carolina. My address is Post Office Box 116, Graysburg, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I received a primary education and have 44 years of experience as a laborer (2nd helper Stockroom, keeping stock for machine no. 1) with the above named company.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

After 44 years of service with the Albemarle Paper Mfg. Co., I was released from my job Sunday, Feb. 13, 1966, at 3:00 p.m., without compensation, only to work when called. In this position I lose all seniority and fringe benefits. Salary for Stockroom 2nd helper is from $2.58 to 2.70 per hour. I was listed as a laborer at $2.39 per hour. I was placed on "Call Board" meaning, part time work, if needed. As a results, I lose my departmental seniority and fringe

benefits and all persons on call are the first to be laid off regardless of seniority. I also believe that departmental progression is discriminating by United Papermakers and Paperworkers, Local no. 425 AFL-CIO.

In that Negroes are relegated to certain departments and are not permitted on basis of seniority to be promoted to better jobs in other departments, I believe that I was removed from my place of employment and replaced by White because of my race and color.

/s/ Arthur Mitchell
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-281]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: February 17, 1966

My name is Henry Hill. I am a Negro citizen of the United States and a resident of North Carolina. My address is 1944 Carter Street, Roanoke Rapids, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, N. C. I applied for work with the above named employer on ....., and was refused work on Dismissed on Feb. 14, 1966. I applied for a position as a ..... My qualifications for the position are: (State education, training and/or experience.) 3rd Grade education, and 18 years 4 months, valve puller for 14 years.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial can be included.)

On Monday February 14, 1966, I was removed from my job as valve puller where I had been employed for 14 years. I had seniority over the 2 white men working in my department. Most white men are trained on any and all jobs, regardless of educational level at the rate of about 3 months training. I was placed on what is called the "call board"; meaning part-time work, if needed. As a result, I loose my departmental seniority and fringe benefits, and persons on the call board are the first to be laid off—regardless of

seniority. I also believe that departmental progression is discriminating by United Papermakers and Paperworkers, local No. 425 AFL-CIO.

In that Negroes are relegated to certain departments, and are not permitted, on the basis of seniority, to be promoted to better jobs in other departments, I believe that I was removed from my place of employment and replaced by white men because of my race and color.

/s/ Henry Hill
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-275]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Theodore Daniels, Age: 33. I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 2, Box 439, Roanoke Rapids. My complaint is against Halifax Local No. 425 AFL-CIO, whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I completed the 10th grade and have eleven years of experience with the Albemarle Paper Mfg. Co.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

The above named union, which is a bargaining agency for most of the employees in the Albemarle Paper Mfg. Co., including myself is guilty of discriminating against Negroes in upgraded employment. According to the guidelines of progression in Labor Management Agreement, Halifax Local No. 425 discriminates against Negroes in progression of policy making staff. There are no Negroes on the negotiating staff. Negroes are not protected by the union in upgraded employment according to seniority in that no

Negroes have been placed in any position according to Guidelines, page 16, entitled "Seniority."

1. We have been refused redress of grievances by union management.

Negroes are not permitted in meetings where negotiations of grievances are in question.

2. During incliment weather, Negroes have to crawl under flat cars without proper equipment to protect our bodies. Whites are not required to do this and they are furnished adequate clothing by the paper mill.

3. The union conspires with the company to discriminate against Negroes.

4. Negroes have been refused copies of the new wage agreement by the union and are paid salaries below that of Whites performing the same type duties. For instance: Negroes must perform any and all jobs requested of them, including operating bulldozers, repairing cranes, etc., which are jobs that pay up to $3.00 per hour. We are classified and paid as laborers of $2.39 per hour.

/s/ Theodore Daniels
Signature

[Jurat omitted in printing]

PLAINTIFFS' EXHIBIT NO. 5

(Affidavit of Joe P. Moody, et al., February 17, 1966)

* * *

General Patterns of Racial Discrimination As Practiced by the Albemarle Manufacturing Paper Company, Inc., and Halifax Local 425 AFL-CIO

I. Organizational Discrimination.

A. The above union and company have organized the factory in departments with seniority only in the unit in which you work. As a result, Negroes are relegated to a particular department and do not have seniority in any other department in the factory—usually menial jobs.

B. Since July 2nd, 1965, one Negro has been placed in a few previously all white departments, see enclosed labor management agreement.

II. Hiring Practices—The unreasonable tests that are being administered to Negroes, 133 questions, require 100 correct answers for passing—other tests, perhaps administered to other white persons consist of 50 questions, requiring 18 for passing. The 3rd test has the same requirements. It is believed that these tests are discriminatory in practice. Secondly, Negroes with a number of years of seniority are required to take the same tests, if they are to be promoted to other jobs. White people are not required to take the test for seniority promotions. And, if Negroes take the test, even if they have worked 40 or 50 years for the company, and pass, they will lose their seniority if they enter another department at the same company. Most of the 90 Negroes hired on all levels at the plant are in positions of laborers or utility men, which is the lowest paying level in

the factory. Even though they perform any and all duties such as mechanics, machine operator, repairmen and etc. without pay.

III. Discharging Practices of Discrimination.

A. The company and union have policies of placing Negro employees on what is known as 'Call-board.' This is a part-time position where you are called back to work, if you are needed. As a result of losing regular employment, Negroes have lost up to 44 years of seniority and all fringe benefits due them as a results of their long record of employment. When there are permanent lay offs, the persons in the above position are the 1st to be laid off. As a result, a man with 44 years of seniority, may be replaced with a man who has 6 months of seniority. We believe this to be gross discrimination on the part of the part of the union and management, as mentioned above.

B. Negroes are relegated to menial positions in the factory with less pay and and opportunities for seniority advancement in the plant. To my knowledge no Negroes have been promoted on the seniority plan according to the agreement of progressions, see attached guidelines.

C. Out of approximately 650 persons, more or less, there are less than 100 Negroes employed in the plant. Ratio of population in Halifax County, Negro, 56%, white, 44%. Many of the departments are totally segregated, including office, staff and management, technicians, laboratory workers and supervisory staff.

D. Negro part-time workers have fewer working hours than whites, and many of the older Negro employees are being placed from regular to part-time employment.

We believe that the gross discrimination is due to race and color.

We, the undersigned, being citizens of the County of Halifax, in the State of North Carolina, do certify that the foregone statement is true to the best of our beliefs.

/s/ Joe P. Moody

/s/ Arthur Mitchell

/s/ Theodore Daniels

Signatures

[Jurat Omitted in Printing]

PLAINTIFFS' EXHIBIT NO. 14

Labor Agreement

Between

Roanoke Rapids Division, Albermarle Paper Mfg. Co., Inc.

and

United Papermakers and Paperworkers, AFL-CIO

and

Halifax Local No. 425

United Papermakers and Paperworkers

Roanoke Rapids, North Carolina

September 18, 1965-September 15, 1968

* * *

Section 10

Seniority

10.1.1 If employees are to be promoted or demoted, the Management shall take into consideration seniority and ability and when all the factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department (as shown on attached Appendix F) shall prevail.

10.1.2 In those cases in which an employee declines in writing to accept a job advancement he shall by so doing change his seniority to the lowest seniority standing among the employees rated in that particular job in that particular department. An employee who is offered the chance to sign a statement declining and refuses to sign the statement but nevertheless declines will be considered to have declined in writing.

10.1.3 In cases of permanent promotions or demotions in a department in which seniority is not followed the Local Union President will be notified. In case of permanent promotions in which a suitable employee does not exist within a department one may be selected by the Company from another department after discussion of the matter with the Union Committee for the first department.

10.1.4 An employee promoted to a permanent supervisory vacancy in his own department will accumulate departmental seniority while acting as a supervisor in that department for a period not to exceed six (6) months. At the end of six month period the employee will then become a permanent supervisor or placed back to his former position, unless otherwise agreed by mutual agreement between the Company and the local Union.

10.2 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

10.3 Definitions—Job, Department, Plant Seniority

For the purposes of this Agreement there shall be three (3) types of seniority: job seniority, department seniority and plant seniority.

Job seniority is defined as total length of continuous service in a job classification; seniority in a higher job(s) in the same line of progression shall count toward job seniority in lower job(s) in said line of progression.

Department seniority is defined as length of continuous service in one of the departments listed in Appendix F.

Plant seniority is defined as length of continuous service from most recent date of employment.

10.4.1 Vacancies (including increases in complement), and reductions (including curtailments, and decreases in complement) calling for promotions, or demotions, as noted in 10.1.1 will be practiced as follows:

10.4.2 When the vacancy or reduction is expected to continue for a period of more than two (2) weeks, job seniority in accordance with provisions of 10.1.1 will apply across all shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

When applying this paragraph 10.4.2 the Company shall have three days in which to make the move.

10.4.3 When the vacancy or reduction is expected to continue for two (2) weeks or less, job seniority in accordance with provisions of 10.1.1 will apply within the individual shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

10.4.4 When the company needs an employee for a job advancement for two (2) weeks or less, an employee will

normally be promoted within the shift on which the vacancy occurs, but when there is no qualified employee available on the shift in which the vacancy occurs, the Company may require the available qualified employee with the highest seniority to take the job advancement. In such situations of promoting across shifts for two (2) weeks or less paragraph 10.1.2 shall not apply to employees who refuse a job advancement other than such available qualified employee with the highest seniority.

10.5 It is agreed that the plan for the progression of employees in the Maintenance Department shall be as provided in Appendix C attached hereto and a part of this Agreement.

10.6 To maintain their rehiring rights, employees who are laid off because of lack of work must notify the Company in writing once in each thirty (30) days following date of layoff, giving their current address and signifying their continued interest in returning to work for the Company. The failure of an employee to comply with the above provision within the time limit specified shall void his rehiring rights. When employees are laid off, they will be advised of this provision. Employees being recalled to work shall be notified by certified mail and must return to work within ten (10) days from date of such notice unless an extension of time is agreed upon. A copy of said notification shall also be sent to the Union.

10.7 In applying 10.4.2 an employee who has bypassed another employee(s) will be deemed to have one day more seniority than the by-passed employee(s).

10.8 If the Company makes an error in applying the provisions of this Section with regard to layoffs, recalls, promotions, demotions, transfers, the Company shall not be liable for any payment to an employee as correction or

compensation for such error for such period of time from the time the employee or the Union knew or was aware of the error until he or the Union brings the error to the attention of the Company.

10.9.1 Job seniority shall be lost and all rights attributable to it forfeited by:

a. Transfer to another line of progression which extends beyond periods specified in 10.2 above.

b. Transfer to another department which extends beyond periods specified in 10.2 above.

c. Separation initiated by employee which shall be deemed to include resignation and retirement.

d. Discharge.

e. Absence due either to layoff or disability or both, for a period equal to his plant seniority at the time such absence began, but in no event shall an employee retain seniority if absent in excess of two years.

f. Failure to comply with Section 10.6.

10.9.2 Department seniority shall be lost and all rights attributable to it forfeited by: (b) through (f) of paragraph 10.9.1.

10.9.3 Plant seniority shall be lost and all rights under this Agreement forfeited by (c) through (f) of paragraph 10.9.1.

10.9.4 During the first continuous sixty days of lay-off an employee's seniority shall continue to increase and if he returns to work within this period, he shall be reinstated without loss of seniority. During such period he shall not receive holiday pay or other benefits unless he is recalled within ten calendar days from the date of lay-off.

* * *

PLAINTIFFS' EXHIBIT NO. 15

Labor Agreement
Between
Roanoke Rapids Division, Albemarle Paper Mfg. Co., Inc.
and
United Papermakers and Paperworkers, AFL-CIO
and
Halifax Local No. 425
United Papermakers and Paperworkers
Roanoke Rapids, North Carolina
September 23, 1968-September 15, 1971

* * *

Section 10

Seniority

10.1.1 If employees are promoted or demoted, the Management shall take into consideration seniority and ability and when all the factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department (as shown on attached Appendix F) shall prevail.

10.1.2 An employee shall not be permitted to refuse a promotion without the Company's permission. An employee may be "frozen" only by the Company. If an employee is permitted by the Company to refuse a promotion, he shall have his seniority changed to the lowest seniority standing among the employees in that particular job in that particular department.

10.1.3 In cases of permanent promotions or demotions in a department in which seniority is not followed the Local Union President will be notified. In case of permanent promotions in which a suitable employee does not exist within a department one may be selected by the Company from

another department after discussion of the matter with the Union Committee for the first department.

10.1.4 An employee promoted to a permanent job outside of the bargaining unit whom the Company decides to return to the bargaining unit within six (6) months shall, if so returned by the Company, have his job, department and plant seniority restored with additional credit on all three types of seniority for the time spent outside the bargaining unit. The six (6) month period may be extended by mutual agreement between the Company and the Local Union.

10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of progression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a "permanent" vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his "red circle" rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application.

10.3 Definitions—Job, Department, Plant Seniority

For the purposes of this Agreement there shall be three (3) types of seniority: job seniority, department seniority and plant seniority.

Job seniority is defined as total length of continuous service in a job classification; seniority in a higher job(s) in the same line of progression shall count toward job seniority in lower job(s) in said line of progression.

Department seniority is defined as length of continuous service in one of the departments listed in Appendix F.

Plant seniority is defined as length of continuous service from most recent date of employment.

10.4.1 Vacancies (including increases in complement) and reductions (including curtailments and decreases in complement) calling for promotions, or demotions, as noted in 10.1.1 will be practiced as follows:

10.4.2 When the vacancy or reduction is expected to continue for a period of more than two (2) weeks, job seniority in accordance with provisions of 10.1.1 will apply across all shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

When applying this paragraph 10.4.2, the Company shall have three (3) days in which to make the move.

10.4.3 When the vacancy or reduction is expected to continue for two (2) weeks or less, job seniority in accordance with provisions of 10.1.1 will apply within the individual shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression in accordance with this provision. The provisions of 10.1.1 will also apply within the individual shifts of the line of progression to the filling of vacancies caused by employee(s) being on vacation even though such vacation may extend longer than two (2) weeks.

10.4.4 When the company needs an employee for a job advancement for two (2) weeks or less, an employee will normally be promoted within the shift on which the vacancy occurs, but when there is no qualified employee available on the shift in which the vacancy occurs, the Company may require the available qualified employee with the highest seniority to take the job advancement. In such situations of promoting across shifts for two (2) weeks or less paragraph 10.1.2 shall not apply to employees who refuse a job

advancement other than such available qualified employee with the highest seniority.

10.5 It is agreed that the plan for the progression of employees in the Maintenance Department shall be as provided in Appendix C attached hereto and a part of this Agreement.

10.6 To maintain their rehiring rights, employees who are laid off because of lack of work must notify the Company in writing once in each thirty (30) days following date of layoff, giving their current address and signifying their continued interest in returning to work for the Company. The failure of an employee to comply with the above provision within the time limit specified shall void his rehiring rights. When employees are laid off, they will be advised of this provision. Employees being recalled to work shall be notified by certified mail and must return to work within ten (10) days from date of such notice unless an extension of time is agreed upon. A copy of said notification shall also be sent to the Union.

10.7 In applying 10.4.2 an employee who has by-passed another employee(s) will be deemed to have one (1) day more seniority than the bypassed employee(s). The above sentence shall, effective September 23, 1968 apply only to cases in which an employee(s) refuses a promotion and such can be refused only with the Company's permission. After September 23, 1968, employees who are bypassed for promotion because of disqualification by the Company shall not lose seniority to those who bypass them but such bypassed employee(s) shall not be deemed eligible for future consideration for promotion unless they present the Company with acceptable proof that they have eliminated or overcome the reason for the disqualification.

10.8 If the Company makes an error in applying the

provisions of this Section with regard to layoffs, recalls, promotions, demotions, transfers, the Company shall not be liable for any payment to an employee as correction or compensation for such error for such period of time from the time the employee or the Union knew or was aware of the error until he or the Union brings the error to the attention of the Company.

10.9.1 Job seniority shall be lost and all rights attributable to it forfeited by:

a. Transfer to another line of progression which extends beyond periods specified in 10.2 above.

b. Transfer to another department which extends beyond periods specified in 10.2 above.

c. Separation initiated by employee which shall be deemed to include resignation and retirement.

d. Discharge.

e. Absence due either to layoff or disability, or both, for a period equal to his plant seniority at the time such absence began, but in no event shall an employee retain seniority if absent in excess of two years.

f. Failure to comply with Section 10.6.

10.9.2 Department seniority shall be lost and all rights attributable to it forfeited by: (b) through (f) of paragraph 10.9.1.

10.9.3 Plant seniority shall be lost and all rights under this Agreement forfeited by (c) through (f) of paragraph 10.9.1.

10.9.4 During the first continuous sixty days of lay-off an employee's seniority shall continue to increase and if he returns to work within this period, he shall be reinstated without loss of seniority. During such period he shall not receive holiday pay or other benefits unless he is recalled within ten calendar days from the date of lay-off.

* * *

WONDERLIC

PERSONNEL TEST

FORM A

NAME..... Date.....
(Please Print)

READ THIS PAGE CAREFULLY. DO EXACTLY AS YOU ARE TOLD. DO NOT TURN OVER THIS PAGE UNTIL YOU ARE INSTRUCTED TO DO SO.

This is a test of problem solving ability. It contains various types of questions. Below is a sample question correctly filled in:

REAP is the opposite of

1 obtain, 2 cheer, 3 continue, 4 exist, 5 sow ..... [5]

The correct answer is "sow." (It is helpful to underline the correct word.) The correct word is numbered 5. Then write the figure 5 in the brackets at the end of the line.

Answer the next sample question yourself.

Gasoline sells for 23 cents per gallon. What will 4 gallons cost? ..... [ ]

The correct answer is 92¢. There is nothing to underline so just place "92¢" in the brackets.

Here is another example:

MINER MINOR — Do these words have

1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [ ]

The correct answer is "mean neither same nor opposite" which is number 3 so all you have to do is place a figure "3" in the brackets at the end of the line.

When the answer to a question is a letter or a number, put the letter or number in the brackets. All letters should be printed.

This test contains 50 questions. It is unlikely that you will finish all of them, but do your best. After the examiner tells you to begin, you will be given exactly 12 minutes to work as many as you can. Do not go so fast that you make mistakes since you must try to get as many right as possible. The questions become increasingly difficult, so do not skip about. Do not spend too much time on any one problem. The examiner will not answer any questions after the test begins.

Now, lay down your pencil and wait for the examiner to tell you to begin!

Do not turn the page until you are told to do so.

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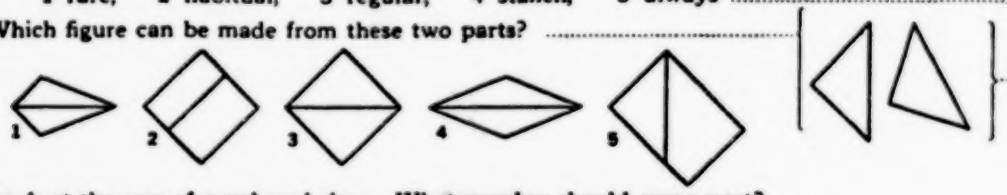
1. The last month of the year is
   1 January, 2 March, 3 July, 4 December, 5 October ..... [___]
2. CAPTURE is the opposite of
   1 place, 2 release, 3 risk, 4 venture, 5 degrade ..... [___]
3. Most of the items below resemble each other. Which one is least like the others?
   1 January, 2 August, 3 Wednesday, 4 October, 5 December. ..... [___]
4. Answer by printing YFS or NO—Does R.S.V.P. mean "reply not necessary"? ..... [___]
5. In the following set of words, which word is different from the others?
   1 troop, 2 league, 3 participate, 4 pack, 5 gang ..... [___]
6. USUAL is the opposite of
   1 rare, 2 habitual, 3 regular, 4 stanch, 5 always ..... [___]
7. Which figure can be made from these two parts? .....



..... [___]

8. Look at the row of numbers below. What number should come next?
   8 4 2 1 ½ ¼ ? ..... [___]
9. CLIENT CUSTOMER—Do these words have
   1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
10. Which word below is related to smell as chew is to teeth?
    1 sweet, 2 stink, 3 odor, 4 nose, 5 clean ..... [___]
11. AUTUMN is the opposite of
    1 vacation, 2 summer, 3 spring, 4 winter, 5 fall ..... [___]
12. A train travels 300 feet in ½ second. At this same speed, how many feet will it travel in 10 seconds? ..... [___]
13. Assume the first 2 statements are true. Is the final one:
    1 true, 2 false, 3 not certain?
    These boys are normal children. All normal children are active.
    These boys are active ..... [___]
14. REMOTE is the opposite of
    1 secluded, 2 near, 3 far, 4 hasty, 5 exact ..... [___]
15. Lemons sell at 3 for 10 cents. How much will 1½ dozens cost? ..... [___]
16. How many of the five items listed below are exact duplicates of each other? ..... [___]

84721	84721
9210651	9210561
14201201	14210210
96101101	96101161
88884444	88884444

17. Suppose you arranged the following words so that they made a true statement. Then print the last letter of the last word as the answer to this problem.
    always A verb sentence a has ..... [___]
18. A boy is 5 years old and his sister is twice as old. When the boy is 8 years old, what will be the age of his sister? ..... [___]
19. IT'S ITS—Do these words have
    1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
20. Assume that the first 2 statements are true. Is the final statement:
    1 true, 2 false, 3 not certain?
    John is the same age as Sally. Sally is younger than Bill. John is younger than Bill. ... [___]
21. A dealer bought some cars for $4000. He sold them for $5000, making $50 on each car. How many cars were involved? ..... [___]
22. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, put a (T) in the brackets; if false, put an (F) there.
    eggs lay All chickens ..... [___]
23. Two of the following proverbs have the same meaning. Which ones are they? ..... [___]
    1. Many a good cow hath a bad calf.
    2. Like father, like son.
    3. A miss is as good as a mile.
    4. A man is known by the company he keeps.
    5. They are seeds out of the same bowl.
24. A watch lost 1 minute 18 seconds in 39 days. How many seconds did it lose per day? ..... [___]
25. CANVASS CANVAS—Do these words have
    1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
26. Assume the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain?
    All Quakers are pacifists. Some of the people in this room are Quakers. Some of the people in this room are pacifists ..... [___]
27. In 30 days a boy saved $1.00. What was his average daily saving? ..... [___]
28. INGENIOUS INGENUOUS—Do these words have
    1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
29. Two men caught 36 fish; X caught 5 times as many as Y. How many fish did Y catch? ..... [___]

30. A rectangular bin, completely filled, holds 800 cubic feet of grain. If the bin is 8 feet wide and 10 feet long, how deep is it? ..... [___]

31. One number in the following series does not fit in with the pattern set by the others. What should that number be? ½ ¼ ⅛ ⅛ 1/16 1/32 ..... [___]

32. Answer this question by printing YES or NO. Does A.D. mean "In the year of our Lord"? .... [___]

33. CREDITABLE CREDULOUS—Do these words have
1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]

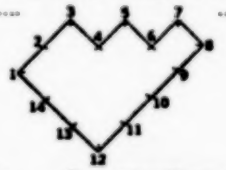
34. A skirt requires 2¼ yards of material. How many can be cut from 45 yards? ..... [___]

35. A clock was exactly on time at noon on Monday. At 2 P.M. on Wednesday, it was 25 seconds slow. At that same rate, how much did it lose in ½ hour? ..... [___]

36. Our baseball team lost 9 games this season. This was ⅜ of all they played. How many games did they play this season? ..... [___]

37. What is the next number in this series? 1 .5 .25 .125 ? ..... [___]

38. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write the numbers as the answer. ..... [___]



39. Are the meanings of the following sentences 1 similar, 2 contradictory, 3 neither similar nor contradictory? A new broom sweeps clean. Old shoes are easiest. ..... [___]

40. How many of the five items listed below are exact duplicates of each other? ..... [___]

Rexford, J. D.	Rockford, J. D.
Singleton, M. O.	Simbleten, M. O.
Richards, W. E.	Richard, W. E.
Siegel, A. B.	Seigel, A. B.
Wood, A. O.	Wood, A. O.

41. Two of the following proverbs have similar meanings. Which ones are they? ..... [___]

1. You cannot make a silk purse out of a sow's ear.
2. He that steals an egg will steal an ox.
3. A rolling stone gathers no moss.
4. You cannot damage a wrecked ship.
5. It is the impossible that happens.

42. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write these numbers as the answer. ..... [___]

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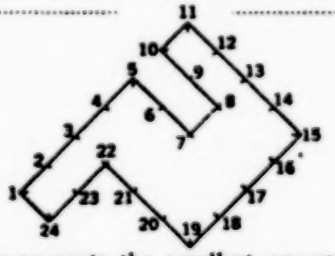


43. Which number in the following group of numbers represents the smallest amount?
10 1 .999 .33 11 ..... [___]

44. Are the meanings of the following sentences:
1 similar, 2 contradictory, 3 neither similar nor contradictory?
No honest man ever repented for his honesty. Honesty is praised and starves. ..... [___]

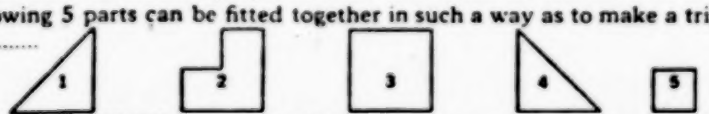
45. For $1.80 a grocer buys a case of oranges which contains 12 dozen. He knows that two dozen will spoil before he sells them. At what price per dozen must he sell the good ones to gain ⅓ of the whole cost? ..... [___]

46. In the following set of words, which word is different from the others?
1 colony, 2 companion, 3 covey, 4 crew, 5 constellation ..... [___]

47. Assume that the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain: Great men are ridiculed. I am ridiculed. I am a great man. ..... [___]

48. Three men form a partnership and agree to divide the profits equally. X invests $4500, Y invests $3500 and Z invests $2000. If the profits are $1500, how much less does X receive than if the profits were divided in proportion to the amount invested? ..... [___]

49. Four of the following 5 parts can be fitted together in such a way as to make a triangle. Which 4 are they? ..... [___]



50. In printing an article of 30,000 words, a printer decides to use two sizes of type. Using the larger type, a printed page contains 1200 words. Using the smaller type, a page contains 1500 words. The article is allotted 22 pages in a magazine. How many pages must be in the smaller type? ..... [___]

FORM A

Question No. 1. 4
2
3
NO
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.2
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2
3
1 or T
3½¢
3
10
1/10
YES
3
20
1/4
SEC.
24
.0025
6-9
2
1
1-4
3-22
.33
2
24¢
2
3
$175
1,2,4,5
Question No. 50. 12

SCORING STENCIL FOR THE WONDERLIC PERSONNEL TEST

Answers must be exactly the same as shown here. There is only one correct answer for each question. Items omitted are counted wrong. The final score is the total number of questions answered correctly in exactly 12 minutes.

FORM A

WONDERLIC

PERSONNEL TEST

FORM B

NAME..... Date.....
(Please Print)

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REAP is the opposite of

1 obtain, 2 cheer, 3 continue, 4 exist, 5 sow ..... [5]

The correct answer is "sow." (It is helpful to underline the correct word.) The correct word is numbered 5. Then write the figure 5 in the brackets at the end of the line.

Answer the next sample question yourself.

Gasoline sells for 23 cents per gallon. What will 4 gallons cost? ..... [___]

The correct answer is 92¢. There is nothing to underline so just place "92¢" in the brackets.

Here is another example:

MINER MINOR — Do these words have

1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]

The correct answer is "mean neither same nor opposite" which is number 3 so all you have to do is place a figure "3" in the brackets at the end of the line.

When the answer to a question is a letter or a number, put the letter or number in the brackets. All letters should be printed.

This test contains 50 questions. It is unlikely that you will finish all of them, but do your best. After the examiner tells you to begin, you will be given exactly 12 minutes to work as many as you can. Do not go so fast that you make mistakes since you must try to get as many right as possible. The questions become increasingly difficult, so do not skip about. Do not spend too much time on any one problem. The examiner will not answer any questions after the test begins.

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1. **PAIN** is the opposite of
   1 poison, 2 torment, 3 agony, 4 comfort, 5 punish ..... [___]
2. One number in the following series is omitted. What should that number be?
   100 97 94 ? 88 85 82 ..... [___]
3. **GENEROUS** is the opposite of
   1 noble, 2 popular, 3 moody, 4 neighborly, 5 stingy ..... [___]
4. **LUXURY** is the opposite of
   1 plenty, 2 rapture, 3 poverty, 4 devotion, 5 failure ..... [___]
5. In the following set of words, which word is different from the others?
   1 Methodist, 2 Easter, 3 Lutheran, 4 Catholic, 5 Quaker ..... [___]
6. **LINGER** is the opposite of
   1 maintain, 2 hasten, 3 require, 4 remain, 5 tarry ..... [___]
7. Assume the first two statements are true. Is the final one: 1 true, 2 false, 3 not certain? The violin is in tune with the piano. The piano is in tune with the harp. The harp is in tune with the violin. ..... [___]
8. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets; if false, put an (F) in the brackets.
   fuel wood are Coal and for used ..... [___]
9. FURTHER FARTHER—Do these words have
   1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
10. A man's car traveled 16 miles in 30 minutes. How many miles an hour was it traveling? ..... [___]
11. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
    A faithful friend is a strong defense. They never taste who always drink. ..... [___]
12. A dealer bought some cars for $2,000. He sold them for $2,400, making $50 on each car. How many cars were involved? ..... [___]
13. How many of the six pairs of items listed below are exact duplicates? ..... [___]

3421	1243
21212	21212
558956	558956
10120210	10120210
612986895	612986896
356471201	356571201

14. A boy is 6 years old and his sister is twice as old. When the boy is 10 years old, what will be the age of his sister? ..... [___]
15. In the following set of words, which word is different from the others?
    1 armada, 2 band, 3 brood, 4 boy, 5 crowd ..... [___]
16. Suppose you arranged the following words so that they make a true statement. Then print the last letter in the last word as the answer to this problem.
    is world The round ..... [___]
17. VOCATION WORK—Do these words have
    1 similar meaning, 2 contradictory, 3 neither same nor opposite? ..... [___]
18. Look at the row of numbers below. What number should come next?
    81 27 9 3 1 ⅓ ? ..... [___]
19. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write the numbers as the answer ..... [___]

20. How many of the five items listed below are exact duplicates of each other? ..... [___]

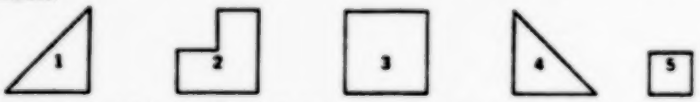
Patterson, A. J.	Paterson, A. J.
Smith, A. O.	Smith, O. A.
Bleed, O. M.	Bleed, O. M.
Petersen, O. W.	Peterson, O. W.
Cash, I. O.	Cash, I. O.

21. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets; if false, put an (F) in the brackets.
    all are Americans countries of citizens ..... [___]
22. Assume that the first 2 statements are true. Is the final statement:
    1 true, 2 false, 3 not certain?
    All red-headed boys are mischievous. Charles is red-headed. He is mischievous. ..... [___]
23. Two of the following proverbs have similar meanings. Which ones are they? ..... [___]
    1. A friend in need is a friend in deed.
    2. Fields have eyes and woods have ears.
    3. A fox is not caught twice in a snare.
    4. A setting hen never gets fat.
    5. A rolling stone gathers no moss.
24. A rectangular bin completely filled, holds 900 cubic feet of lime. If the bin is 10 feet long and 10 feet wide, how deep is it? ..... [___]

25. A watch lost 1 minute and 12 seconds in 24 days. How many seconds did it lose per day? ..... [___]
26. Assume that the first 2 statements are true. Is the final statement: 1 true, 2 false, 3 not certain? Most business men are progressive. Most business men are Republicans. Some progressive people are Republicans. ..... [___]
27. Gasoline is 15 cents a gallon. How many gallons can you buy for a dollar? ..... [___]
28. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? Every pumpkin is known by its stem. Like father, like son. ..... [___]
29. If 2½ tons of coal cost $20, what will 3½ tons cost? ..... [___]
30. How many of the five pairs of items listed below are exact duplicates? ..... [___]

Silverstein, M. O.	Silverstien, M. O.
Harrisberg, L. W.	Harrisberg, L. M.
Seirs, J. C.	Sears, J. C.
Wood, A. B.	Woods, A. B.
Johnson, M. D.	Johnson, M. D.

31. Two men caught 75 fish. A caught four times as many as B. How many fish did B catch? ..... [___]
32. In the following set of words, which word is different from the others?
1 faculty, 2 fleet, 3 flock, 4 friend, 5 force ..... [___]
33. Assume the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain?
Bert greeted Alice. Alice greeted Lou. Bert did not greet Lou. ..... [___]
34. Which number in the following group of numbers represents the smallest amount?
2 1 .9 .999 .88 ..... [___]
35. A side of beef weighs 250 lbs. The average daily beef consumption of a family is 1⅔ lbs. How long will this beef last them? ..... [___]
36. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
Friends agree best at a distance. Friends are one soul in two bodies. ..... [___]
37. How many square yards are there in a floor which is 9 feet long by 21 feet wide? ..... [___]
38. One number in the following series does not fit in with the pattern set by the others. What should that number be? 8 9 12 13 16 17 18 ..... [___]
39. Three of the following 5 parts can be fitted together in such a way to make a triangle. Which 3 are they? ..... [___]



40. A soldier shooting at a target hits it 40% of the time. How many times must he shoot in order to register 100 hits? ..... [___]
41. Which number in the following series represents the smallest amount?
2 1 .8 .888 .99 ..... [___]
42. CENSOR CENSURE—Do these words have
1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? A chip off the old block. A beggar's son struts like a peer. ..... [___]
44. A clock was exactly on time at noon on Monday. At 8 P.M. on Tuesday it was 32 seconds slow. At that same rate, how much did it lose in ½ hour? ..... [___]
45. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? He who demands, does not command. He that complies against his will is of his own opinion still. ..... [___]
46. For $2.40 a grocer buys a case of oranges which contains 12 dozen. He knows that two dozen will spoil before he sells them. At what price per dozen must he sell the good ones to gain ⅓ of the whole cost? ..... [___]
47. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
Where there's a will there is a way. The gods sell everything for labor. ..... [___]
48. The hours of daylight and darkness are nearest equal in
1 June, 2 September, 3 May, 4 December ..... [___]
49. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining 2 of the numbers. Then write these numbers as the answer. ..... [___]

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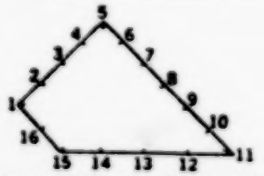

50. Three men form a partnership and agree to divide the profits equally. X invests $5500, Y invests $3500, and Z invests $1000. If the profits are $3000, how much less does X receive than if the profits were divided in proportion to the amount invested? ..... [___]

FORM B

Question No. 1. 4

91

5

3

2

2

1 or T

T

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32

3

8

4

19

4

D

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½

5-11

2

F

1 or T

4-5

9 ft.

FORM B

SCORING STENCIL FOR THE WONDERLIC PERSONNEL TEST

Answers must be exactly the same as shown here. There is only one correct answer for each question. Items omitted are counted wrong. The final score is the total number of questions answered correctly in exactly 12 minutes.

FORM B

Question No. 50. $650

9-13

2

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32¢

3

2 ½ SEC.

3

.8

250

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20

2

21

150 days

.88

3

4

15

1

$28

1

1 or T

6⅔

3

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PLAINTIFFS' EXHIBIT NO. 27B

FEDERAL REGISTER

Volume 35 - Number 149

Saturday, August 1, 1970 - Washington, D. C.

Pages 12311-12379

Title 29—Labor

Chapter XIV—Equal Employment Opportunity Commission

Part 1607—Guidelines on Employee Selection Procedures

By virture of the authority vested in it by section 713 of title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e-12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby issues Title 29, Chapter XIV, § 1607 of the Code of Federal Regulations.

These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Sec.

1607.1 Statement of purpose.

1607.2 "Test" defined.

1607.3 Discrimination defined.

1607.4 Evidence of validity.

1607.5 Minimum standards of validation.

1607.6 Presentation of validity evidence.

1607.7 Use of other validity evidence.

1607.8 Assumption of validity.

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1607.10 Employment agencies and employment services.

1607.11 Disparate treatment.

1607.12 Retesting.

1607.13 Other selection techniques.

1607.14 Affirmative action.

Authority: The provisions of this Part 1607 issued under Sec. 713, 73 Stat. 265, 42 U.S.C. sec. 2000e-12.

§ 1607.1 *Statement of purpose.*

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound pro-

grams of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and em-

ployment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 *"Test" defined.*

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 *Discrimination defined.*

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 *Evidence of validity.*

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used: that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of emperical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majorty of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in diferent units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity

specific to each unit may not be required: *Provided,* That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 *Minimum standards for validation.*

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected

later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory

ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 *Presentation of validity evidence.*

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 *Use of other validity studies.*

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there

are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 *Assumption of validity.*

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonemperical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 *Continued use of tests.*

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person

can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 *Employment agencies and employment services.*

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or

union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 *Disparate treatment.*

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 *Retesting.*

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to

earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 *Other selection techniques.*

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eleminate the conditions suggestive of employment discrimination.

§ 1607.14 *Affirmative action.*

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order

11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

The guidelines in this part are effective upon publication in the *Federal Register*.

Signed at Washington, D.C., 21st day of July 1970.

[Seal] William H. Brown, III,
Chairman.

[F.R. Doc. 70-9962; Filed, July 31, 1970; 8:40 a.m.]

PLAINTIFFS' EXHIBIT NO. 29

Federal Register

Volume 33 - Number 186

Tuesday, September 24, 1968 - Washington, D. C.

Part II

Department Of Labor
Office of the Secretary

Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246

Department Of Labor
Office of the Secretary

Employment Tests By Contractors And Subcontractors Validation

Validation of employment tests by contractors and subcontractors subject to the provisions of Executive Order 11246.

1. *General.* (a) The following order regarding the use of employment tests by contractors subject to the provisions of Executive Order 11246 is being issued in response to numerous requests for policy guidance by Government agencies and by contractors.

(b) Two matters regarding selection procedures are of foremost concern to the Government: (1) Recognizing the importance of proper procedures in the utilization and conservation of human resources generally, and (2) pointing out the possible adverse effects of improper procedures on the utilization of minority group personnel.

(c) The order is founded on the belief that properly validated and stardardized tests, by virtue of their relative objectivity and freedom from the biases that are apt to characterize more subjective evaluation techniques, can contribute substantially to the implementation of equitable and nondiscriminatory personnel policies. Moreover, professionally developed tests, carefully used in conjunction with other tools of personnel assessment and complemented by sound programs of training and job design, can significantly aid in the development and maintenance of an efficient work force.

(d) An examination by the Office of Federal Contract Compliance of compliance reviews of contractors has affirmed the increasing reliance on tests in the conduct of personnel activities. In many cases contractors have come to rely almost exclusively on tests as the basis for making employment and promotion decisions, with candidates sometimes selected or rejected on the basis of a single test score. The examination also disclosed that where employment tests are so used, minority candidates frequently experience disproportionately high rates of rejection through failing to attain score levels that have been established as minimum standards for qualification.

(e) The examination further suggests that there has been a decided increase since 1963 in total test usage and a particularly notable increase in the incidence of doubtful testing practices which, experience indicates, tend to have racially discriminatory effects. These findings are particularly evident in testing programs related to blue-collar and clerical job categories.

(f) It has become clear that in many instances contractors are using tests to determine qualification for hire,

transfer, or promotion without evidence that they are valid indices of performance potential. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking validity (i.e., having no significant relationship to job behavior) and yielding lower scores for minority candidates may resultantly reject many who have probabilities of successful work performance equal to those of non-minority candidates.

(g) The order that follows, dealing with basic issues of validity and fairness in those selection programs in which blue-collar and clerical job categories are primarily involved, was developed only after extensive discussions of the many complex problems and technical considerations with test experts and personnel management specialists from both academia and industry. The provisions of the order are designed to serve as a workable set of criteria for agencies and contractors in determining whether or not selection practices are in compliance with Executive Order 11246.

It is recognized that the tests used by the State Employment Agencies should be similarly validated, and it is expected that the U.S. Employment Service will expand, as necessary, its test validation program for State Agencies.

It is also recognized that test usage, as well as test validity, must be reviewed to determine its effect on the employment of minorities. For example, a test may be suspect when it is given in a language in which a significant number of minority applicants are not proficient and where language proficiency itself is not a bona fide requirement for the job. Similarly, a test or other qualification standard should not be used in a situation involving the transfer or

promotion of minority employees when such employees would already have occupied the positions involved without such qualifications were it not for past discriminatory practices.

Specific directives concerning test usage will be issued by the Office of Federal Contract Compliance within a short time.

2. *Evidence of validity.* (a) It is directed that each agency require each contractor regularly using tests to select from among candidates for hire, transfer or promotion to jobs other than professional, technical and managerial occupations (defined as occupational groups "0" and "1" in the "Dictionary of Occupational Titles," Third Ed.) to have available for inspection, within a reasonable time, evidence that the tests are valid for their intended purposes. Such evidence shall be examined in compliance reviews for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates.

(b) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that a new employee will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs may be expected to change in significant ways, it shall be con-

sidered that candidates are being evaluated for a job at or near the entry level. In the latter case, it would be appropriate for a contractor to institute performance or other tests as a condition of promotion provided such tests also have been validated pursuant to the provisions of this order.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may also suffice for the other. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required.

3. *Minimum standards for validation.* For the purpose of satisfying this order, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in the American Psychological Association's "Standards for Education and Psychological Tests and Manuals." (Evidence of content or construct validity may also be appropriate where criterion-related validity is not technically feasible, but it should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content in the case of job knowledge or proficiency tests or the construct in the case of trait measures.) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards must be met by any approach used so far as applicable:

(1) Where a predictive validity study is conducted, the sample of subjects must be representative of the normal or typical candidate group for the job(s) in question. Where a concurrent validity study is conducted, the sample should

be, so far as technically feasible, representative of the minority groups currently included in the candidate population.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards employed to protect the security of test scores and insure that scores do not enter into any judgments of individual adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance, and tenure. In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be developed carefully and the ratings themselves examined closely for evidence of bias. Whatever criteria are used, however, they should represent major or critical work behaviors as revealed by careful job analyses.

(4) Presentations of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior.

(5) Data must be generated and results reported separately for minority and nonminority groups wherever technically feasible.

* * *

6. *Assumptions of validity.* (a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions

of validity based on test names or descriptive labels, all forms of promotional literature, data bearing on the frequency of a test's usage, testimonial statements of sellers or users, and other nonempirically based and ancedotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

7. *Continued use of tests.* Under certain conditions, a contractor may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, evidence of criterion-related validity in a specific setting is technically feasible and required but not yet obtained, the use of the test may continue *Provided:* (a) The contractor can cite substantial evidence of validity as described in section 5 above, and (b) he has in progress, validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the contractor will use cut-off scores which yield score ranges broad enough to permit the identification of criterion-related validity.

8. *Affirmative action.* Nothing in this order shall be interpreted as diminishing a contractor's obligation to undertake affirmative action to ensure that applicants and current employees are treated without regard to race, creed, color or national origin. Specifically the use of tests which have been validated pursuant to this order does not relieve the contractor of his obligation to take positive and affirmative action in affording employment and training to minority group personnel.

9. *Definition of "test."* For the purpose of this order, "test" is defined as any paper-and-pencil or performance measure used to judge qualifications for hire, transfer or promotion. This definition includes, but is not restricted to, measures of general intelligence, mental ability, and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; knowledge and proficiency; occupational and other interests; and personality or temperament.

* * *

PLAINTIFFS' EXHIBIT NO. 32

Bryan Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of John E. Bryan, Jr., taken by plaintiffs December 13, 14 and 15, 1967. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by plaintiffs' counsel unless otherwise noted.

* * *

[DEP. PP. 499-510]

Q Want to explain your role? A Ah, it might help you to understand it if I told you about the, what I was told about the history of it, because this affected my role in what I did subsequent to my coming here.

Q In addition to the role that you played at Albemarle? A All right, ah, Bill Warren told me that ah, in about '55, '56, just prior to the installation of the number four paper machine, which is the largest capacity paper machine, most modern that we have, that, ah, in conjunction with others in the plant management, he was asked to develop a testing program to get better qualified personnel to man this machine when it went into operation. They had tried to get, ah, better qualified people when number three machine was installed, another large modern paper machine, a few years earlier and, ah, had tried to hire those from outside ah, that had a high school education, but it had not ah, worked out satisfactorily; some of them even with a high school education didn't succeed and ah,—and either quit, were let go, or downgraded or what not, and they didn't make it on the machine, so they wanted to avoid this and Bill proceeded to discuss with other people in the company the possibility of

a testing program and to conduct a validation study. He had, ah, at that time a Master degree in Psychology from Purdue, and had specialized in this area. So, that he did an extensive validation study on the Beta and the Bennett Mechanical Comprehension test. He validated it, ah, against the performance of the incumbent employees at the time. He told me how he did that and so forth. Ah, from that time on, for positions on the general extra board and the Lines of Progression that led from that, they used the Beta and the Bennett Mechanical Comprehension, and for selection for the maintenance apprentice program when it was started a few years later. He found in his validation study that there was a significant correlation between the scores on Beta and performance on the job, and as a result of the statistical calculation you go through in validating tests, he established a cut-off score of, ah, a hundred on the Beta, now, I don't recall the scores in regard to the Bennetts, but, ah, they continued to use that then not only as for selecting people for the number four machine, but also as a pre-employment test from that time on, the Beta, and they were using Bennett Mechanical Comprehension. Now, after I came here, they used it to test and I talked to Bill Warren about it, and Bill at that time was manager of Labor Relations in Richmond. He was still with the company, and he told me, or I told him, ah, I just happened to mention one day that, ah, we were using a certain score which I don't recall, as cut off on the Bennett for selection of new employees, and ah, he said, "You mean that you're, ah, you're disqualifying people if they don't make that score?" And I said, "Yes, this is what they were doing when I got here, and I thought that was what you had established." Well, it turned out that Bill said that he did not find what he considered to be a significant enough correlation between

ah, the scores on the Bennett, and performance on the job, even though it had a high face validity, and, ah, he thought that, ah, since he left down here that they were only using it as a guide to, ah, selection without any cut-off score, without disqualifying anybody as a result, but when I found that out, I suppose several of us were probably concerned about it and we decided, ah, that we should not even use it at all since its, ah, validity had not been established, in fact, it had, ah, ah, I believe Bill said somewhat of a negative correlation, so, we quit using the Bennett at that time.

Q What possible way do you use this Mr. Bryan? A That would have been, uh, probably in the latter part of 1963, and from my knowledge of tests that I acquired in studying psychology, I am very familiar or well, I won't say very familiar, I was familiar with the Beta, I had not ever used it before, but I had studied its origin and development, and usage and knew that it was a nonverbal intelligence test. And I recommended and it was agreed by the local management that we should start using a Verbal Intelligence Test, as well as the Beta; we wanted to keep using the Beta because it had been validated locally, and I had had experience with using the Wonderlic before, which is a short form Verbal Intelligence Test, and knew that it had, uh, probably more validation studies behind it than any other short form Verbal Intelligence Test. So, after consultation we decided to institute the Wonderlic, in addition to the Beta, in view of the fact that the mill had changed quite a bit and it had become exceedingly more complex in operation; whereas in early years the person who was intelligent but had very little Verbal facilities acquired through formal education could, uh, perform satisfactorily on a lot of the jobs, uh, there were very few jobs and getting to be fewer and fewer jobs, in which this was possible, and

we needed people that were not only intelligent, but had a certain amount of, uh, intelligence and, uh, verbal facilities and this sort of thing to do more and more jobs, so, we felt, uh, in view of the fact that it is theoretically possible on the Beta to make a high score, uh, if you are illiterate, this was not the type of person that we needed today, to perform a good many skilled jobs, so, we instituted the Wonderlic and we did not, uh, validate it, uh, locally, primarily, because of the, the expense of conducting such a validation, and there were some other considerations, such as, uh, we didn't know whether we would get the co-operation of the employees that we'd need to validate it against in taking the test, and we certainly have to have that, so, we used National Norms and on my suggestion after study of the Wonderlic and Norms had been established nationally for skilled jobs, we developed a, uh, cut-off score of eighteen (18).

Q Now on the basis of this strike back, you said that uh, Mr. Warren told you that the Beta had been validated. Did he tell you what the validation process consisted of? A Yes.

Q Would you explain to me what he told you? A Yes sir, uh, he uh, took uh, people already employed in the plant, in skilled jobs such as, uh, on number three machine.

Q With the plant, I mean with the Roanoke Rapids facility? A Yes, this all pertains to Roanoke Rapids, part of the number three machine, and he took maintenance men, among others, and, uh, I'm sure, I think he may have taken, uh, pulp mill personnel and perhaps some from the wood yard, but the idea was to get people in the skilled jobs, and he explained what he was trying to do to these people and I think he said that he asked cooperation of the Union in

urging them to cooperate in the taking of the test. They were given the test on company time. Then he asked the supervisors over these individuals to use a rank order method of, uh, comparison in which the supervisor was given a deck of cards that had these people that he, with whom he was familiar with, or that he was familiar with their work he had supervised, and he was asked to rank them in order of, uh, his evaluation of their performance on skilled jobs if they were in the higher skilled jobs in the Line of Progression or if they had not progressed that far, what he thought their potential was to perform when they got to those skilled jobs. They ranked them and this was, uh, I believe, uh, I'm not sure, I think Bill even, uh, ran these through the computer to get them tabulated and to get a rank order comparison with their test scores. He did end up with a comparison between the ranking by the supervisor and the test scores that they made and this is how he developed the, uh, fact that there was a high correlation between score on the Beta and the ranking by the supervisors, and he had as many supervisors evaluate an individual as had sufficient knowledge of that individual's performance, for instance, uh, he'd have the first line supervisor evaluate the individual and then the next line supervisor would also evaluate the individual and in that way you got four tour foreman and these people had worked under different ones over the years so he would have each one evaluate the people they knew, so that he could get more than one supervisor's evaluation.

Q Would the, did you get Mr. Warren to tell you that the validation study was conducted only as to the skilled personnel? A Yes, that is correct.

Q Did Mr. Warren tell you that the sample that he used

included both Negro and white employment? A Uh, no, uh, matter of fact, uh, we didn't discuss race at all.

Q You didn't discuss race at all? A Uh huh.

Q At the time that you were Personnel Manager, Mr. Byran, do you know whether they had Negroes in the skilled Lines of Progression? A Well, at the time that I came here I don't recall there being any, in, uh, the skilled Lines of Progression. Since I have been in that job and my present job, there have been a number who have entered the skilled Lines of Progression.

Q Did Mr. Warren tell you that the validation study, tell you how long a period of time to make the validation study? A I don't recall him telling me specifically, but from all that he went through, I gathered that it took an amount of weeks or maybe it might have even taken a month or so, and he might have, it seems to me that, uh, it's perhaps possible that he, uh, he ran the study with maybe the paper machine crew on one occasion and maybe the maintenance department, uh, a little later. I vaguely recall something to that effect.

Q Did Mr. Warren tell you that the validation study had been reduced to writing? A Well, uh, not exactly. In that he had not written the whole thing up, uh, in what you might do if you were doing it for purposes of a thesis, let's say, and uh, he did have some records of uh, the test scores and rankings of individual employees, but that he had uh, he had not uh, written up a synopsis of it.

Q Did you read any written materials relating to the validation studies before you made your recommendations for a Verbal Test? A What do you mean by that?

Q Uh, I'm asking you that, I'm asking you if you read any reports, written reports or concerning the validation of the Beta Examination? Whether it was a complete report of a partial report of fragments before you made the recommendations for the institution of the Verbal Test. A If you mean, did I, uh, read and uh, books on tests and measurements about—

Q No. A About the Beta?

Q What I'm asking is, you said that Mr. Warren conducted a validation test from the Beta. A Yes sir.

Q And you say you don't know whether he did a full written report of the validational studies. A I don't think he did.

Q He may have made fragmentary notations? A Yes.

Q Et cetera. I'm asking you if you read any of anything in writing relation to the validational study conducted by Mr. Warren before you made your recommendations for the Verbal Test? A I don't recall reading anything, because as I say, he didn't have a report, he and I just discussed the thing, uh, orally, and he told me what he had done and what the results were and this sort of thing, uh, and I don't know whether he showed me at that time or whether I saw it later, but I have seen at some time names of people and the scores that they made and uh, that served as a background for his putting these things together.

Q Now you stated that you did have some experience with the Wonderlic. A Yes sir.

Q Was this one of the reasons why you recommended the Wonderlic's use? What experience did you have with it?

A Of course, I first encountered the Wonderlic in college and courses on tests and measurement and uh, uh, studied it there and studied, uh, the material that had been developed about its validation and use and this sort of thing and, uh, I've taken the Wonderlic myself, on I don't know how many occasions in the, in terms of applying for jobs with other companies. Then, uh, uh, with, I think uh, with two previous employers uh, we used the Wonderlic.

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PLAINTIFFS' EXHIBIT NO. 36A

Boinest Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of M. Lebby Boinest, Jr., taken by plaintiffs March 12 and 13, 1968. Each excerpt is preceded by a reference to the page of transcript from which it is taken. Questions are by Plaintiffs' Counsel unless otherwise noted.

* * *

[DEP. P. 26]

Q What is your occupation? A I am vice-president of the Kraft Paper Division of Albemarle Paper Company.

* * *

[DEP. P. 27]

Q Did you hold a position with the company prior to becoming manager of the grocery bag plant? A I did.

Q What position was that? A Paper Mill superintendent of the Roanoke Rapids Operation.

Q How long did you hold that position? A About 13 years.

* * *

[DEP. PP. 33-34]

Q Now you indicated that the B Paper Mill was opened after you went with the plant in 1952. Do you recall the approximate year that the B Paper Mill was opened? A The first part of the B Paper Mill went into operation on January 23, 1953.

Q When that mill was opened, you had the responsibility for supervising that department also? A I did.

Q You had the responsibility for securing employees for that department? A No.

Q Did you discuss with the personnel manager the staffing of the B Paper Mill? A Obviously.

Q Would you state the procedure you followed in staffing that department? A Well, let's see how much of it I can recall. We transferred some skilled people in certain paper machine Lines of Progression in our mills, in our Richmond mill, and from our Roanoke Rapids mill some of these boys were transferred to the new operation. Others were hired from competitive mills to fill the upper echelons of the Lines of Progression, Machine Tenders, Back Tenders, et cetera.

Beyond that, we transferred a number of people, I don't know how many, from other segments of the mill at Roanoke Rapids, and we employed the remaining persons from the local available labor force in the Roanoke Rapids area. Again I can't specifically say how many.

* * *

[DEP. P. 36]

Q Do you recall, Mr. Boinest, when you instituted testing at the Albemarle Paper Plant in Roanoke Rapids? A My memory is that it was sometime around 1955 or 1956. I can't be specific.

Q Do you recall, Mr. Boinest, when you instituted the requirement of a high school education at the Paper Plant in Roanoke Rapids? A It was sometime prior to the startup of No. 3 machine.

Q Would you explain what No. 3 machine is? A That was the beginning of the B Paper Mill. Excuse me.

* * *

[DEP. PP. 42-49]

Q Did you play a part in the determination to require the passing of a test for employment? A Well, I don't know how to interpret exactly what you mean by play a part. I was involved in a general decision on the part of the mill management to institute a testing program. That stemmed from the fact that we had not had in our judgment particularly good selection of experienced persons at the time of start-up of the No. 3 Paper Machine.

At the time the testing was talked about and at the time it was instituted, the company was already making plans for the installation of a second machine at Roanoke Rapids, which was going to require another fairly comprehensive staffing job in terms of people and skills, and we wanted to do, in fact, we had to do a better job in staffing the second machine than we had done in the case of the first one. In a fair amount of discussion it became apparent that we should have something beyond the stipulation of a high school education as a condition for employment in order to get people who could adequately staff the jobs and who had the capabilities to move up the Lines of Progression to the top jobs or, in the case of Paper Machines, the Machine Tenders, and it was on that basis that the desire was held on the part of the management to implement some sort of testing program which would be a better guide than the present one that we had, which was the high school education.

To that extent I was involved.

Q I was going to ask what your involvement was in the company's determination for a test. A Well, I will try to reconstruct this as best I can recall it.

Q I just want to know exactly what you did. A I discussed with the personnel manager and the management of the mill the desirability of instituting a testing program

to give the mill a better selection of employees to staff the operations, which was in the planning stage at that point.

Q Did you play a part in the selection of a test? A I did not. I am not a testing expert. I know nothing about the details of tests.

Q Do you know how the company proceeded to select the tests? A I believe at that point in time Mr. Warren was the personnel manager. He had some considerable background in testing and in testing procedures, and I believe that a fair amount of the groundwork, specifically as it involved the tests which were later put into effect, was his judgment and recommendation.

Q Do you recall the first test that was instituted by the company, the name of the test? A I do not.

Q Do you recall whether the employees in the B Paper Mill, Paper Machine Line of Progression, were required to go back and take the tests? A In the B Paper-Mill Line of Progression?

Q Yes. A Prior to the institution of the tests on a regular basis, is that your question?

Q No, at the time you instituted the tests you had already opened the B Paper Mill Department? A That's right.

Q Did you require the employees at the B Paper Mill, Paper Machine Line of Progression, to take the tests? A We did not require it. Actually in an effort to validate the tests which were used we had to have some yardstick in which to determine whether the tests that we were going to consider using had any validity in terms of the types of things we were looking for.

We had an agreement with the union on a volunteer

basis that the members of the B Paper Mill crew would take the test in an effort to establish a cut-off point, if you will, or a validation of the two pieces, as I recall, of the tests, to be used as a guideline for subsequent validation of the tests and implementation of it as a requirement of pre-employment in that Line of Progression.

Q Now do you know the procedure that you followed in trying to validate the tests? A Well, I could tell you what I know about it. What was done by agreement between the company and the union on a volunteer basis as I recall, every member of the B Paper Mill Lines of Progression, the Paper Machine and the Stock Room agreed on a voluntary basis to take the tests that was being proposed on the condition that the scores of individuals would not be identified to supervision and that in no case would the results of the tests be detrimental to the position of anybody who agreed to take the tests on a voluntary basis.

The test was conducted by the personnel department on a group basis, shift by shift. The paper, answer sheets or whatever was involved in it were taken by the personnel manager. The things were graded and those numbers were never knowledge to anyone in supervision in the mill. It was done on a voluntary, cooperative basis between the company and the union.

Q And you are stating that the employees in the B Paper Mill participated in the testing? A That was the group which we were trying to establish qualifications for, so that was the logical group to take the tests.

Q Did the employees in the A Paper Mill take the test? A They did not.

Q Did the employees in Wood Yard Department take the test? A I do not know.

Q Did the employees in the Boiler Room Department take the test? A I don't know.

Q Did the employees in the Pulp Mill Department take the test? A I do not know.

Q The only employees taking the test were the employees in the B Paper Mill? A That was the only one I was interested in.

Q Did any negro take the test? A So far as I am concerned at that point in time they did not, since none of them were in that Line of Progression.

Q I believe you stated you were giving the test, a voluntary test, to select the score or the cut-off score to the employees of the B Paper Mill? A It was an attempt to validate these two tests, whatever they were. It was to determine what would be an acceptable level in light of employees on their jobs and their relative performance on those jobs.

Q How did you select the cut-off scores? A I don't know that.

Q All you know you gave the employees the test in the B Paper Mill? A That's right.

Q You don't know how the cut-off score was selected? A We had already agreed we would not know the score, and I did not know the score of anyone who took it, nor did anyone under my supervision. That was a part of the agreement.

Q Did you know or did you subsequently learn the cut-off score? A I did not.

Q Do you know presently the cut-off score? A I do not.

Q You don't know how then you selected the cut-off score? All that you know is that you had these employees take these tests? A That's right.

Q You indicated that you considered the job performance of the employees? A Right.

Q How did you consider the job performance of the employees? A The job performance of each individual employee within the crew was evaluated, and I can say this was a subjective judgment as to how he performed the job which he was occupying. In most of the cases, because we had rotation of people across shifts within the paper mill group, we had more than one supervisor within the B Paper Mill who would be conversant with the performance of each employee on his shift. That was not true in all cases, but in most cases it was true.

We did, in fact, have each first line supervisor or foreman, together with the assistant superintendent and myself, who had direct first hand knowledge of performance of individuals' job performance, and their ability to progress up the Line of Progression, and this was supplied to the personnel department, I assume, for a comparison of scores.

Q Did you have any written standards or criterions for evaluation of job performances? A We did not.

Q Did you pass personally on the job performance on each individual who took the test? A No, not directly. I was sufficiently far removed that I couldn't. I was not capable of making a first hand judgment of every employee.

Q And each supervisor or foreman made his own determination of a job performance of an individual? A Yes.

Q And you stated this was subjective? It had to be? A No other basis.

Q And you state further that only white employees were tested and evaluated in their job performance? A Only incumbents in the job were tested.

* * *

[DEP. PP. 50-51]

Q You indicated that you felt that the high school education was not the best determinant of job performance. Do you recall why the company continued to use a high school education or a test? A Well, I will go back and qualify what I said about a high school education. The complexities of jobs in some of these Lines of Progression that we are talking about are such that the company was convinced that a high school education was a starting point, and it was a necessity in terms of an individual being capable or qualified to get to the top of the Lines of Progression that a high school diploma was a beginning point, and that was a minimum.

Now there were some high school graduates whom I suspect, I know there were some high school graduates who didn't have the capability to do these jobs either, who didn't have the inate ability to acquire the knowledge necessary to staff some of these jobs higher up in the Lines of Progression.

It isn't an indictment of the people. It's the facts of life, and in a broad spectrum basis a high school education per se doesn't qualify people to be skilled paper machine operators, so the company felt it was necessary to go beyond that in an effort to adequately staff the operation, and that was what was done. That was why we went beyond, pure and simply, the high school education requirement.

Q My question, however, is why you continued to accept a high school education or a test score? A I am not

aware that we did. At the time we are talking about we required a high school education and a test.

* * *

[DEP. PP. 53-54]

Q So you do not know of a comparison of any others who were not required to take the test and the ones that took the test in the B Paper Mill, Paper Machine Line of Progression, A All I can say is, high school education good or bad, we had a far better crew on the second paper machine than we did on the first. For what reason, I don't know, but the performance and skills of the people on that machine in operating practice, the record will clearly indicate that the performance of the operation was extremely better.

* * *

Q Now did you at any time make any correlation between what you describe as the better performance when the new machine opened up in the B Paper Mill and the test score? A I told you I did not.

* * *

[DEP. PP. 60-61]

Q How do you go about promoting efficiency in production at the Albemarle Paper Plant in Roanoke Rapids? A Well, I would say you put together the best possible management personnel. You staff the operations with the best available work force, and you provide them with the best tools which your money allows you to acquire. You put those tools and people together and attempt to manage them on an as efficient basis as your knowledge allows you to do.

* * *

[DEP. PP. 68-80]

By Mr. Lowden: Cross Examination

Q What changes were made in the mill in the early 1950s? A Well, in terms of equipment, when I went to Roanoke Rapids in 1952, the mill as I recall had a productive capability of about 300 tons a day of pulp and approximately 50 tons a day of paper from the two small paper machines. With the disparity between pulp and paper production being consumed in the Richmond operation, which we shipped pulp to, in 1952, when I went to Roanoke Rapids, that was the situation.

In 1953 we started up the B Paper Mill in terms of the No. 3 Paper Machine which was a production unit capable of 200 to 250 tons of production a day, and we had essentially installed about 6 million 500 thousand dollars of equipment to produce this paper.

We obviously had to build up the productive capabilities of the pulp mill in order to sustain production for the three paper machines there and three in Richmond, for which we had to still produce pulp; so there were rather broad changes in the plant actually.

There was a substantial investment and a lot of new equipment, a lot of sophisticated equipment which was new and different to us, new and different to the industry.

The technology of the pulp and paper industry at that point was moving ahead as rapidly as within any 5 or 6 year history of the industry, so the mill in terms of equipment and in terms of jobs and in terms of opportunities changed substantially during the early 1950s.

* * *

Q It was at that time that you instituted the requirement of a high school education? A The technology of

the industry having moved, the demands of the skills were changing drastically. People who could operate what I would chose to call horse-and-buggy type of operations could no longer do those types of things. In the Paper Machine, for example, a Paper Machine producing 10 or 15 tons a day is a small, slow-moving installation. It doesn't require the knowledge, the skills to the same degree that are attendant to a machine which is moving at speeds of 1,500-1,800 feet a minute, which a man can no longer depend on his eyesight, on his feel for the job, but he rather must rely on what has now become substantially sophisticated technical pieces of equipment in order to staff the jobs and man it, so the requirements for skills at this time changed just as did the hardware.

Q The No. 3 Paper Machine, at the time that you staffed that, would you go over again just how you went about doing that? A No. 3 Machine?

Q No. 3 Machine, yes. A In the staffing of the No. 3 Machine, we took an inventory essentially of the skills and the people which we had in the Albemarle organization, both in Roanoke Rapids and in Richmond. We determined that we had a small nucleus of people who were performing in the A Paper Mill at Roanoke Rapids who had a capability in our judgment to perform certain jobs in the B Paper Mill.

For instance, a man who had been a machine tender, the top man in the line in the No. 1 paper machine, I remember specifically was transferred to the B Paper Mill as a back tender on the No. 3 machine, one step down the line in terms of progression, but in our judgment had the ability to learn that job and ultimately to progress to the top job on that line. He did exactly that, that particular individual.

In the course of the thing we determined that we had a limited number of people who had these abilities in the Roanoke Rapids plant. We then looked to the Richmond operation and we transferred some 6 or 7 out of the Browns' Island and Hollywood operation to Roanoke Rapids to similar jobs on the No. 3 paper machine.

We still didn't have enough skills to staff a machine. We went out into the industry where these other skills were, and we hired people, I testified earlier, as far away as Antioch, California, and we hired one or two people from the Union-Camp plant at Franklin, Virginia and we hired one from a plant at Mobile, Alabama and from the plant in Pensacola, Florida, specifically qualified skilled people to fit into these lines in the upper echelons.

Having done that, we then made available the remaining openings to other people within the Roanoke Rapids plant on a basis that they could request transfer and, if they, in the judgment of the company, were capable of filling these lower jobs and then progressing up the line, then we considered those for those jobs.

Having done all that, we still didn't have enough, and we then went to the outside and we stipulated that these people must have high school educations.

Q Now I believe you testified that as a result of the experience in staffing the No. 3 machine, you were dissatisfied with the method of selecting people? A Well, I don't know that I could agree that we were dissatisfied. We were less than pleased with the results.

Q All right, can you explain that a little more in detail? A Well, some of our judgments as to peoples' ability to progress along the Line of Progression simply didn't pan out. People who we thought had the capabilities to move

ahead and learn the jobs in an orderly sequence simply demonstrated by their performance they did not have this ability, and those that had transferred from other departments, some were actual transferred back to the department from which they had originally come, and others were eliminated through just normal attrition.

There were some people we hired from the outside new to the operation, from a physical standpoint, from an interest standpoint, despite the fact that they were high school graduates, it simply wasn't their cup of tea and didn't want to do this kind of work and did not perform well. I wouldn't say we were completely dissatisfied, but we were less than pleased with the way it came out.

Q Then, if I understood you, the next step in between the time you had the staffing of the No. 3 Paper Machine and before you began staffing the No. 4 Paper Machine the tests were instituted for people who were going to come to the No. 4 machine? A This is correct. We were seeking some measure, some yardstick. I guess we could argue about whether it was a good yardstick or a bad one, but it was a yardstick available to us which we thought was better than what we had been using, and we implemented the testing procedure which has been talked about before, purely and simply, to attempt to change the direction of our experience relative to the first machine, hopefully, to not have the mortality rate among people who came on to the job.

It certainly doesn't work to the company's benefit or to the people either to put them in jobs which they are not qualified to do.

Q Turning your attention to the Lines of Progression, not specifically these, but the ones that were in existence, in practice say in 1952, were these lines in your opinion established on the basis of the racial characteristics of the

people or were there other reasons for the development of those Lines of Progression? A In my judgment there was never any conscious attempt to look at Lines of Progression within the framework of race at all. You must understand that the problems attendant to the operation of a pulp and paper mill and its complexities require that you have an orderly evolution and an orderly training program, and most of our training must be done on the job.

We must have a device by which we can move people along the progression from the lower jobs to the higher ones and they must have an opportunity to be trained in the course of doing this. This is the reason for the Lines of Progression.

They have no basis in race as far as I am concerned or that I am aware of, and as far as I am personally concerned, whenever these things were started, whether 1952, 1954, as far as I am concerned none of these Lines had any basis for saying that these people go in this Line of Progression or this job because they are negroes or because they are whites. They were put in these Lines of Progression and moved along this way because in the opinion of the management of the company they had the ability to perform this job or that job and they had the capabilities to move from this job to that job, and I am bound to say at this time some of this had to be subjective. It didn't have a genesis in race.

* * *

By Mr. Chambers: Redirect Examination

Q With going right back to what you just said in your denial of consideration of race and establishment of Lines of Progression, the company has submitted in its answers to interrogatories, and I would like for you to

explain why you have only Negro employees in the Service Line of Progression in the Wood Yard Department? A Mr. Chambers, I think it is important that we understand what, at least, what I understand and other people have testified in this case, I understand. We are working with a group of people primarily in the Roanoke Rapids general geographical location. Some are Negroes; some are whites. Within the framework of that group of people down there we have people who have historically, conceivably been denied opportunities for education and these sorts of things, which I am perfectly willing to agree have happened. I don't feel that this company can be held 100 percent accountable for the fact that these people have not in all cases gotten an education or been denied an education or had a desire to get an education or a desire to equip themselves to accept jobs requiring certain skills in our industry, or in anybody else's industry.

The facts of the case are we have to work with what is there. The Negro population in the Roanoke Rapids area, by and large, does not have from an educational standpoint in many cases, in most cases, in the majority of the cases in the Roanoke Rapids area sufficient educational qualifications to meet the job requirements of many of these jobs in the Lines of Progression.

They do have the qualifications and ability to do some of these jobs, and I think the records at our mill at Roanoke Rapids will clearly suggest that there have been opportunities for these people of limited background, which I cannot criticize them for, and I don't think this is a result as far as their own efforts are concerned that they haven't gotten these things, but the fact is these things exist, and that is what we have to work with. These people have filled the jobs and have done the jobs which they were cap-

able of doing, which their qualifications equip them to do, and I don't suggest to you, sir, for one minute that these happened to be because they were negroes or because they were whites. There are white people in that mill who don't have these capabilities or qualifications either.

Q At one point there, will you explain why they are in different Lines of Progression, the whites who do not have the capabilities or qualifications? A I think this is the more of the times which we find ourselves. Certain jobs have been considered within this plant negro jobs over the years, going way back prior to my going there and, as such, the social mores of the society said these are negro jobs, and we couldn't get white people to fill those jobs. I am not suggesting that it is right or wrong. I am suggesting only that that is a fact of life. That is something that has occurred, right or wrong, which I submit we are not, cannot be held liable for that.

Q You are admitting then that you did have negro jobs and white jobs at the Roanoke Rapids plant? A I am suggesting that we had Lines of Progression which happened to evolve in completely or predominantly the negro on the one hand and completely or predominantly the white on the other. I submit this evolution did not have the genesis in race per se.

Q Then you are speaking from your knowledge of how they had their evolution? A I can only speak from the point that I have direct knowledge, and that is from my experience in the mill this is the way it evolved.

Q Are you stating that all negroes at your plant are incapable of filling jobs which are filled predominantly by whites? A I did not say that or infer it.

Q Would you say that in your Yard Crew Department you have no negroes in the Wood Yard Department who can perform one of those job positions, and even including the top position?

Mr. Lowden: Top position of what?

Q Yard Crew Line of Progression? A Are you saying that none of these negroes in this line could perform in these lines? Is that your question?

Q That is correct. A I can't testify to that. I don't know.

Q You made a statement just a moment ago that in your experience in the Roanoke Rapids area the negroes were incapable of performing the jobs that are predominantly filled with whites? A I didn't say that, I don't think.

Q Are you saying that? A No, I don't say that.

Q Are yau saying that there are no negroes employed at your plant which were capable of performing jobs that are filled predominantly by whites? A I suspect that there are some.

Q Then can you explain why they are not in the white Line of Progression? A I can only surmise.

Q Would you give us your reasoning or opinion on that? A I would suggest that they haven't indicated an interest in being in those Lines of Progression.

Q Is it your testimony now that the negro employees have not indicated an interest in the Yard Crew Line of Progression and that is why they are not in the line? A I cannot testify direct to that, but I can tell you in terms of B Paper Mill, which I am thoroughly familiar with and

have been for a number of years, that this line was from 1953 to this date, so far as I know, staffed almost completely with transfers from other departments.

Q We are going to come to that, but first of all with the Wood Yard Department, in your general statement in answer to Mr. Lowden that you do not think that your Lines of Progression were racially oriented— A I do not think that.

Q I was trying to get the basis of your opinion and trying to get some explanation for negro Lines of Progression and white Lines of Progression, which I think your previous testimony indicated existed at the Roanoke Rapids plant. A Well, again I don't know how to testify specifically to the qualifications of any individual employees in the Lines of Progression in the Wood Yard Department.

Q Then your answer to Mr. Lowden's question has to be taken with that qualification; is that correct? A In response to Mr. Lowden's question I was not attempting to recite specific cases relative to individual jobs within any department of the mill. I was attempting to respond to his questions within the general framework of what I believed to be the genesis and the evolution of the Lines of Progression as presently existing in Roanoke Rapids.

PLAINTIFFS' EXHIBIT NO. 58

Moody Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Joseph P. Moody, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle Counsel unless otherwise noted.

* * *

[DEP. P. 4]

Q Would you state your name, please? A Joe P. Moody.

* * *

[DEP. PP. 6-7]

By Mr. Chambers:

Q Before you began working for Albemarle Paper Company, did you work for any other employer? A Yes, I used to work for the city.

Q What city would that be? A Roanoke Rapids City.

Q What type of work did you do there? A I used to clean up aside of the streets, clean up leaves, help pour cement—anything like that.

Q Did you ever work for anyone else? A Well, I used to farm—practically all my life—raised up on the farm —cut a little pulpwood.

Q Who was your employer? A Farming, you mean?

Q Yes. A I farmed some for Mr. Hubert Floyd. He's dead now. After I stopped farming, I went to the pulpwood—cut a little pulpwood for Mr. Biddy Shaw. Then,

I left there and went to the city and then after I left the city, I got a job with Rust Engineers down here on this No. 3 mill at Albemarle Paper Company. After I left there, Mr. Buster Seay, Personnel Manager at Albemarle Paper Company, he was up on the yard one day and I asked him about a job. He told me to come over next morning—"see about staring you to work."

* * *

[DEP. PP. 47-48]

Q What type of education do you have, Mr. Moody? How many grades did you attend school? A Well, I started to go to school, never got out of the primer.

Q In which grade did you finish your education? A I never go none much.

Q Did you ever finish the first grade? A No, I did not.

Q Have you taken any courses since you have been working for Albemarle Paper Company—correspondence courses, night courses or any type of courses—to improve yourself? A No, I have thought about going to school a couple of times but all my knowledge of the (I am not bragging, hope people don't think I is bragging on the little understanding I is got) that my understanding that what I received come from the Man above. He and I deals a lot together and He shows me which way to go.

* * *

PLAINTIFFS' EXHIBIT NO. 60

Hill Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Henry Hill, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle counsel unless otherwise noted.

* * *

[DEP. P. 108]

Q State your name, please. A Henry Hill.

* * *

[DEP. P. 113]

By Mr. Chambers:

We would like to tender an objection for the reason that the witness has the same problem that your former witness had. He cannot read.

* * *

PLAINTIFFS' EXHIBIT NO. 61

Mitchell Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Arthur Mitchell, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle counsel unless otherwise noted.

[DEP. P. 125]

* * *

Q Will you state your name, please? A My name is Arthur Mitchell.

* * *

[DEP. P. 127]

* * *

Q In what manner do you believe the company is discriminating against you? A Well, what I think about it, I work all them many years there, and that is all you might say I know how to do, and they take me out of there and put me in a different place doing something I can't do. That is the part I don't think was right.

* * *

[DEP. P. 132]

* * *

A Well, they didn't never call me no more. After they told me then, didn't never call me for to take no tests.

* * *

PLAINTIFFS' EXHIBIT NO. 62

Katzell Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Raymond A. Katzell, taken by Defendant May 21, 1969. Each exceprt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle Counsel unless otherwise noted.

[DEP. PP. 2-8]

Being first duly sworn, was examined and testified as follows:

Examination by Mr. Lowden:

Q Dr. Katzell, would you please state your name and address for the record, please? A Raymond A. Katzell, 1 Barry Drive, Glen Cove, New York.

Q Your present occupation? A I am a psychologist.

Q Are you connected with New York University? A Yes. I am Professor of Psychology and head of the Department of Psychology at New York University.

Q Doctor, this case involves a charge by certain Negro employees at the Roanoke Rapids, North Carolina, paper mill, the Albemarle Paper Company, and the case has been going on for some time. And we asked the plaintiffs some depositions, one of which was: state the names of people who have knowledge of the case, and in answer to that they did not include your name, but included Mr. Richard Barrett. But we were subsequently told that should have been you. So that—in order to shorten this down, I would like for you to state for the record the general areas in which you

have knowledge of this case. A Well, I have read some of the trial testimony that has been taken earlier—the testimony of Mr. Palmer and Mr. Bryant. I have also examined certain other documents that describe the organization and the progression lines of the paper mill. I have been given some general oral information about the context of the case and the nature of it by Mr. Robert Belton who is an attorney with the [NAACP, Legal Defense Fund,] and also had some conversation with Mr. Chambers.

I believe this would represent the major source of information that I have about the case.

Q And did they employ you to testify in the matter? A Yes, they have.

Q And is the area of your testimony going to be limited to testing or are you going the testify about other matters in addition to that? A As I understand, it is the former; it is the area of testing.

Q So that you and I can just talk about that then. Doctor, as a psychologist, I assume that you are familiar with the Beta—let me get the name of it right—you are familiar with the Revised Beta Examination? A Yes, I am.

Q Are you familiar with the development of the Beta Test which was originally developed by the Army in World War I? A Yes, I am.

Q Could you describe for us how the original Beta Test was developed? A Well, an effort was made to develop various pictorial and other kinds of non-verbal questions so that a test of mental ability could be used with military recruits of little or no literacy. I don't recall the names of the principals who [were] involved in actually devising these kinds of questions but they were psychologists asso-

ciated with the United States Army, World War I. And the test was administered to large groups of recruits in the Army, and related, among other things, to the military occupations that these recruits—military and civilian occupations—that these groups occupied.

Q And the purpose was to measure an individual's intelligence? A Yes, general intelligence and general mental ability.

Q You would say it was originally devised—the examination was professionally developed? A Yes, I would.

Q Now, it's been revised once or twice by Mr. Kellogg and Mr. Morton, in the early thirties, and then I think I have—the one that I have in my hand was revised in 1946. Do you have any knowledge of Mr. E. C. Kellogg and Mr. N. W. Morton? A None, other than their association with this particular test.

Q Do you know if they are psychologists? A I do not.

Q Would you say the revisions were professionally developed? A It is my impression from the information contained in the test manual that it was professionally developed, yes.

Q Does the Beta Examination and the Revised Beta Examination have a high correlation with individual tests of intelligence? A It has a substantial correlation. I wouldn't characterize it as high, for that is a matter of word meaning.

Q So that you—it would be your opinion, then, if I could summarize it, it would be your opinion that the Revised Beta Examination has a high correlation with in-

dividual intelligence and that it is an attempt to do that by means of a culture free examination? A I didn't use the words "culture free." It is an attempt to do so by means of a non-verbal examination.

Q Would you know what would be the average raw score—I believe the right words are—of an average high school graduate on the Revised Beta? A No. I don't remember the specific figures.

Q I will hand you a copy of the Revised Beta Manual and ask you what the correlation is with the Otis S-A Test?

Mr. Chambers: I don't understand that question.

Q (Mr. Lowden) Do you understand my question? A Yes, I do. According to Table VI, on page ten of the Manual, a correlation of .71 is reported for a group of 198 subjects between the Otis S-A Test of Mental Ability and the Revised Beta.

Mr. Chambers: Was the question the correlation between the Otis Test and the Revised Beta Test?

A Yes.

Mr. Chambers: I take it that Dr. Katzell was being asked about a document entitled "Revised Beta Examination Manual," Revised 1957?

A Yes.

Q (Mr. Lowden) Doctor, are you familiar with the Wonderlic Personnel Test? A Yes.

Q Could you tell us what that is a test of? A It is also a test of general mental ability, however, this, unlike the Beta, is a test which uses—is substantially verbal in nature, but purports to measure the same general kind of intellectual capacity.

Q Unlike the Beta Test, if you also gave a person the Wonderlic Personnel Test, would it give you some idea as to whether or not they can read and write, more so than the Beta Test would? A Yes.

Q Can you tell us how the Wonderlic Test was developed? Would you like to look at this? A It was developed by Mr. E. F. Wonderlic, whose name it bears, and by recollection it was—the nature of the items were derived from various other kinds of mental ability tests which had prior been used as vocabulary, word meaning, [verbal] reasoning items, arithmetic reasoning, for example.

Q To shorten the question: do you know—would you say the Wonderlic Test was professionally developed? A Yes, I would.

Q And you agree it does measure intelligence? A That, Mr. Lowden, as you perhaps know, is a question that isn't readily answered, because psychologists are by no means in agreement of what intelligence means. I would—if you could rephrase your question—

Q All right. A —as to whether this is a representative of a type of test intended to gauge general mental ability, ability to learn and think in abstract terms, I would answer: yes, that this is a characteristic example of that type of test.

* * *

[DEP. PP. 12-20]

By Mr. Chambers:

Q In your work with the United States Department of Labor have you performed any services in connection with the development of testing guidelines for the Office of Federal Contract and Compliance? A Yes, sir. In the

process of developing the order, the executive order [on validation] of tests for employment purposes, the Office of Federal Contract and Compliance invited a number of specialists from industry, education, labor unions, to meet with them from time to time to propose the features of that order and to review drafts. I had some service in that capacity. Last fall I was asked to serve as co-chairman of an advisory committee on selection and tests which the OFCC established to assist in the administration of the—well, administration and interpretation of the order which was issued last September by then Secretary of Labor Wirtz. I accepted that appointment and I am still so serving.

Q Now, the order that you are referring to, was this order dealing with testing by industries receiving contracts with the federal government? A That is correct.

Q Testing of employees? A Correct.

Q Or applicants for employment? A Correct.

Q Have you in your work performed any services for the Equal Employment Opportunity Commission in connection with its guidelines for testing? A No, I have not, although in my work with the OFCC I have conferred with representatives of the EEOC.

Q About their guidelines? A About their guidelines, yes, sir.

Q Was your—one of the objectives of the work by the OFCC in connection with testing to establish some guidelines to prevent racial discrimination by employers? A That is correct.

Q In the use of tests? A That is correct. Tests and other selection procedures, I might add.

Q Do you recall the most recent guidelines of the OFCC? A Yes.

Q For testing? A In general terms I do, yes.

Q Do you recall the date that that set of guidelines— A I believe the date was 1966.

Mr. Chambers: For the record, we have a set of guidelines from the OFCC. A From the OFCC or EEOC?

Mr. Lowden: From the OFCC.

A Was your prior question about OFCC or EEOC? I'm sorry. I thought you were asking about the EEOC. The 1966 date—the OFCC order was issued [in 1968].

* * *

Q (Mr. Chambers) Dr. Katzell, in connection with the guidelines for testing, one of the questions put to you by counsel for the defendant about the Revised Beta and Wonderlic being professionally developed, would you state for the record what you understand "professionally developed" to mean? A The term is used in somewhat different senses. My interpretation of the sense in which Mr. Lowden—the sense in which Mr. Lowden intended the question is whether in the process of constructing the test originally professional considerations guided the selection of items and checking out their suitability, and it was in that sense—my interpretation of that sense of the question that I answered in the affirmative, that it was my opinion that it was professionally developed. The term "professionally developed" has also been used in a broader sense to refer to the degree to which professional standards have been applied, not only to the construction of the instrument itself, but the way the instrument is applied in arriving at determinations of its suitability for personnel decisions. In

other words, in the latter sense the term is used to cover not only the original construction of the instrument, but whether the whole procedure of its utilization was professionally developed, which would include not only its construction but the extent to which evidence was secured in a local situation as to the validity of the test, its reliability, and the determination of norms regarding how applicants or employees of that organization performed on the test.

Q So, for us laymen, professionally developed could mean that a group of professionals got together and devised a test, following the procedure that is considered to be standard procedure for developing a test? A Right.

Q And it could also mean, for us laymen, the use of the test to insure validity in measuring what you want to? A Yes. The distinction is whether the instrument is professionally developed or the program for the use is professionally developed. That is, one could have a professionally developed instrument which then is abused by incompetent people in building this instrument into a selection program, and if that were the case, I don't think it would be appropriate to say that the program of testing in a given organization was professionally developed, even though a professionally developed instrument may be used as part of it.

* * *

Q (Mr. Chambers) Dr. Katzell, in your development or work on the guidelines for testing for OFCC, was it your understanding that professionally developed tests which are permitted to be used under the guidelines would include both those that are professionally developed in terms of the way that the questions are selected, and so forth, and also the professional use of the test?

Mr. Lowden: Just—before he answers that, we take the position that what is—OFCC does has no relevancy because this is a Title VII case.

Mr. Chambers: You can still answer it, Doctor.

A Yes. The OFCC order addresses itself primarily to the way in which tests are used, that is, the way they are actually built into a program of selection rather than to the mechanics of devising the instrument.

Q (Mr. Chambers) Would that also be true of the guidelines for testing of the Equal Employment Opportunity Commission? A Yes, it would be in my judgment.

Q Have you published any material relative to testing, that you have had published? A Yes, I have.

Q Do you have your Vitae with you? A No, I do not.

Q Could you name some of the publications? A Yes.

Q At this time, Dr. Katzell, rather than go through the list of publications, I will show you a document entitled "Testing [and] Fair Employment" and ask you if you were one of the co-editors of that publication? A One of the co-authors.

Q Co-authors? A Yes.

Q Now would you state, for the record, what the purpose of this study was? A Yes. This document you have shown is a—is [primarily] a report of a research project conducted by myself and my colleagues at New York University under the auspices of the Ford Foundation, the study having had the objective of determining in a sample of work situations the extent to which tests were or were not similarly valid for different ethnic groups, and whether or not

there was evidence of unfairness of the test when applied to members of different ethnic groups.

Q Did you find in your study any differences in the performances of various ethnic groups on certain tests? A Yes, we did.

Q Did you find in your study any fallibility on the correlation of test performances by various ethnic groups and their performances on the job?

Mr. Lowden: Would you read the question?

(Question Read)

A Well, I am not sure I understand your question.

Q (Mr. Chambers) Let me rephrase it. Would you tell us what you found in your study? A Well, one thing we found was that there is not a stable picture about the validity of tests for ethnic groups or the fairness of such tests of different ethnic groups from one situation to the next. In other words, we did find instances where there were—the tests were equally valid or invalid for different ethnic groups in the sense that the job performance of members of one ethnic group [was] not underestimated on the basis of their test scores. In other words, their job performance was in line with their test scores just as the job performance of other ethnic groups [was] in line. We also found [instances] where members of one ethnic group might tend to get lower scores on the test but not perform their job less adequately, and instances of the latter sort were those that we identify as being unfair to members of the group that obtained the lower test scores.

* * *

[DEP. PP. 27-48]

Q What are your views on the value of paper and pencil tests for selecting personnel? A Well, I generally believe that paper and pencil tests can potentially be a highly useful technique for determining the qualifications of job applicants or candidates for transfer or promotion, and both in my own experience and through many citations in the literature of the field, we know of instances where paper and pencil tests have been found to be substantial indicators of the suitability of a person for performing a job. However, we also know that whether or not a paper and pencil test will, in fact, have the utility that it is potentially capable of having depends on its proper utilization. So that one can't on a blanket basis say that all tests are useful under all circumstances or no tests are useful under any circumstances. [Simply]: potentially the strategy of testing can be [useful] if properly [implemented] according to certain professional standards which have been developed in the field over [the several decades that], the tests have been used for selection.

Q What, then, would be some of the conditions of proper use that would make tests desirable? A Well, the critical point is that the test must be job relevant. Now, to be sure that a test is indeed job relevant, that it does indeed indicate the suitability of placement for a given individual in a given job, there are certain procedures that are widely acceptable standard procedures for doing this. For example, an initial critical step in developing a testing program for personnel selection is to study the job or jobs in question very thoroughly as a basis for estimating those human capabilities and traits that are critical to the adequate performance of the job. This is a step that in the parlance of the field is spoken of as job analysis.

On the basis of such a careful job analysis an experienced test specialist can surmise tentatively what tests may have the capacity to measure the abilities and traits that are apparently germane to that job. That is a matter of judgment, of course, still at this stage. It depends on the test specialist's [assessment] of the relevant characteristics based on his job analysis, and it is always a matter of judgment based on his knowledge of tests and which tests in the past, through research, have been shown to have some accuracy in assessing the particular qualities in question. In order to see whether these judgments or surmises are in fact true, it is necessary to conduct a validation study. A validation study in effect consists of studying a sample of employees by means of a test, that is, administering the test to the sample of employees, and also obtaining one or more criteria of their ability to perform the job. These may be production records; they may be ratings by supervisors who have intimate knowledge of the work performance of the individuals in question, and the like. The study then consists of determining the extent to which the scores that people obtain on the tests are correlated with or paralleled by their performance on these indicators or criteria of job effectiveness. If the result is that the test scores do in fact parallel the job criteria, that is, those people who get higher test scores are also those whose ratings of job effectiveness are higher, and those of lower test scores are those whose ratings of job competence are lower, then in the terminology of the field we speak of such a test as being valid. It is valid to the extent that the scores on the tests are correlated with criteria of actual job performance. So this is a critical step, to see whether in fact this validity exists.

It is possible, of course, and it is not infrequently the case, that a test which in the judgment of the test specialist appears like it may be valid for a job turns out not to be

so, and [when] actual validation study is performed. This is because, for some reason, the specialist made misjudgment of the element involved.

If the test is found to be valid on the basis of such a study, another important step is to determine what level of test performance seems to be, such as to differentiate those who are likely to be good job incumbents from those who are likely to be less satisfactory incumbents on the job. And this is often called a cut-off score or a critical score, and this again is empirically determined from the data; by comparing the scores of the better performers on the job with the scores of the poorer performers, or of the scores of those succeeding with those who fail, it is possible to determine a score or range of scores that distinguishes those of the greater likelihood of success and those with the poorer likelihood of success and to use this as a guide in the future personnel decisions of new people that come along and take these tests.

So that, to summarize the three critical steps, the performance of the job analysis, the validity study of the test presumed to be—assumed to be helpful on the basis of the job analysis to determine whether in fact the tests are valid, and, thirdly, the determination of scores, cut-off scores, to serve as guides for judging the—whether an employee's performance is such as to lead him likely to be an acceptable or unacceptable employee.

* * *

Q (Mr. Chambers) You spoke of job relevance. I gather you were talking about job analysis, or what do you mean? A Yes, I think all of these steps that I described are important to determining whether or not the test and the standard of employment based on the test are in fact relevant

to the individual's job capabilities. And if—if these steps were not performed, or not performed satisfactorily, there would be a high risk that the tests were not in fact job relevant, that is, that a person's score on the test cannot properly be taken as an accurate indicator of his job suitability, or that the standard that was used in judging him might be one that excluded him from the job when, in fact, the data might show that he in fact possessed enough of the ability represented by the test so that he could be a satisfactory incumbent of the position. I might add another point in terms of this professional application of tests for purposes of selection. And that is that if the test is going to be used for a sample of job applicants or candidates who are heterogeneous with respect to some characteristic that might affect their test performance, then it is essential test practice to [conduct] these empirical validation studies practically for each of the subject groups of such employees constituting the heterogeneous sample. Samples might be heterogeneous with respect to sex, for example, and it may very well be the significance of a given test score for a woman might not be necessarily the same indicator in terms of job suitability as for a man, or more appropriately, as the case before us here, it is also quite possible that the test scores don't have identical meanings for a sample of culturally disadvantaged or educationally disadvantaged persons as compared to a sample of culturally or educationally more advanced persons. And the guidelines that are applicable in such instances, then, is to separately ascertain for each of the ethnic or culture groups involved what degree of validity there is between the scores on the test and criteria job performance, and, also, what is the relevant cut-off score or differentiation of those who are more likely to succeed from those who are less likely to succeed.

I wonder if I might use that to maybe just explain a little more fully some of the terms I have used.

I mentioned before that the term "validity" is used to refer to the degree to which scores on a test correlate with some measures or criteria of actual job performance. The relevance of that concept to this question of dealing with two or more ethnic groups is that it is possible for a test to be suitably valid for one ethnic group but not for another. If that were the case, it might be perfectly acceptable practice technically for the company to use the test for employing people of Group A, but it wouldn't be much point of using the test for persons of Group B, because the test wouldn't have the same relevance to illuminating their likely job performance and therefore would be inappropriate to use for them. Also, the test might prove to be invalid for either group as in the case of the Kaiser group and/or it might prove to be valid for both groups. And we have an example of a set of studies that I was co-author of, an example where the tests were approximately equally valid for two ethnic groups. There is another example that I got into earlier about cut-off scores, to which I referred a little bit. That is the concept of fairness. A test may be valid for two ethnic groups, each of two ethnic groups, and yet it is possible for it to be unfair to one of those groups relative to the other group. That is because it is possible for a test to underestimate the job performance of members of one ethnic group relative to what is [estimated] for members of another ethnic group. Thus, for example, for members of one race it might be that the cut-off scores that differentiate those who are likely to succeed from those who are likely to fail as a score of—just to name an arbitrary figure—of 20, but for the other ethnic group, when it is studied separately, it might be in the neighborhood of —take a score of 15, let us say. That score of 15 would be

equally indicative of ability to do the job as was true of the score of 20 for the other group.

You might wonder why this might be. This might be because there are certain factors in the makeup and background of individuals in one ethnic group that adversely affect their test performance. A test like this would be technically unfair and discriminatory between the groups. And for this reason it is, especially in the light of the Civil Rights Act, and the OFCC, the EEOC, that the psychological profession, having been alerted to these kinds of problems of fair employment, is now accepting as a guideline for satisfactory professional practice the separate validation and the separate determination of cut-off scores for the various ethnic groups that are present in the labor force or potential labor force in appreciable numbers.

Q Now, Dr. Katzell, if you were an employer and considering instituting a test as a requirement for an employee, would you just give us the steps that would be generally accepted in the profession for the employer to follow in selecting and instituting the test? A I think that this is a technical area. Amateurs in it are too likely to make mistakes. And I think an employer would be well advised, if he were planning to institute testing programs, to see that he had the guidance and counsel of experienced personnel and testing personnel. I think if he did that, he would find that the advice given to him, or the work done by this employee that he brought in to do this work for him, would follow pretty much the lines that I have mentioned earlier. That the test specialist would, first of all, try to identify in which areas of employment there are—there do seem to be [selection] problems and where there are some evidences that whatever methods you are now using don't yield satisfactory employees, and having identified cer-

tain kinds of jobs and certain ladders of progression [where] there seem to be a high frequency of unsatisfactory employees. We might then take these as our target to see whether we couldn't develop a testing program. Once having identified those, we would go through the steps that we have indicated before, that is, doing this job analysis, trying out the tests that seemed to be suitable on the basis of job analysis on a sample of either current incumbents trying to test them on some [applicants], trying to follow them on up after placed on the job, in both instances to see how the test works out when compared to some distinct separate measure of job success or job [effectiveness; then we would analyze these data] to see whether the validity is sufficient to be able to warrant using on [the tests] for personnel [decisions. If there were] heterogeneoused—at least two ethnic groups present in some appreciable number, then to undertake to see that the validation study was done separately on each of the ethnic groups involved.

And, also, that I would check to see that the cut-off scores that were established on the basis of the test were indicative of the same probability of job success for each of the ethnic groups involved.

Q Let me see if we can put that in layman's terms. Let's start, first of all, with the job analysis. Would that include the determination of what the job position would require in terms of what the employee would actually do in the job position? A That is correct.

Q In other words, the employer would take Position "A" and determine what the employee would do in Position "A"? A Include a description of the actual abilities and behaviors that an individual performs in accomplishing this job, the responsibilities and duties. Beyond that, it also involves an assessment of those knowledges, skills, and

other human traits and characteristics that are entailed in performing this job. So it is what does the individual do and what kind of a person must he be in terms of his knowledge and aptitude, and [some] in order to do—to be able to do and execute those responsibilities competently.

Q And if one were looking at a department, one would look at all the job positions in a department; if one were going to use a test in selecting employees in a department, one would look at all the job positions within the department? A Yes. Certainly, those that were related in terms of some progression ladder, because, typically, when one wishes to consider an employee, he considered him not only from the standard of his initial position, but if there is some likelihood that he is going to be progressing in that ladder with reasonable rapidity, then he would be considered in terms of his suitability for the next higher job as well.

Q Now, the second point that you mentioned that would be considered in the job analysis, that being the qualities or attributes that an individual would have to have in order to perform a job, would be a subjective determination initiated by the employer to determine what things he really wanted to measure with the test? A Yes. Ideally, this should be done, again, by a professional who is experienced in this kind of thing because the judgment is not easily made. In other words, what I am suggesting is both the determinations of the job duties and the judgments regarding the capabilities involved in performing the job should be made by an experienced individual in the personnel field.

Q Along that same vein, and if one department would require certain attributes, would it necessarily follow that each department within the plant itself would require those same attributes? A No, sir. It would not necessarily

follow. Certain jobs might require different attributes than other jobs, or even if the same attributes were involved, certain jobs might require them at a minimum level that was different from the minimum level involved in another job.

Q In this instance one would be talking about a test measuring different attributes? A That's right. You have different test standards in such a case.

Q Now, after the company had made this job analysis, the next step would be selecting the test to measure those attributes that the company felt were necessary for the particular job or position? A That's correct.

Q And I gather that there are thousands of tests in the field? A That is correct.

Q Now, how would one go about selecting the test? A This again is a judgmental matter. The professional in the field is generally—should be knowledgeable about the way in which the use of the test in the past in other situations has shown it to be relevant to the traits or attributes that seem to be involved in this particular company—the jobs in this particular company. He knows this partly from his own personal experience if he's worked along these lines in the past. And, of course, there is an extensive body of literature in which there have been records of experience with tests being tried out at various kinds of companies—various kinds of job situations, so it would be his knowledge of which tests, based on past experience, have shown some promise of measuring the traits and abilities that appear to be involved in the jobs in question that would lead to decision that the test appears to be promising for use for this particular job, whereas, Test "B", "C", "D", and "E" seem to be less suitable.

Q Now, since we have made the job analysis and have selected tests, or a battery of tests, the next step would be the validation of the test? A That's correct.

Q And I think you defined that as determination of whether there was any correlation between the test performance and the performance of the individual on the job? A Correct.

Q Now, how would one proceed in validating the test, and let's assume the heterogeneous group that the employer was going to pick from? A Ethnically heterogeneous, you mean, for example?

Q Right. A Well, there are two basic strategies that can be followed there. The one that most specialists in this field would generally recommend be followed, if feasible, is to administer this test—let's assume for the purposes of illustration that we are talking about only one test, the same principle that applied when we felt it desirable to use two, three, or four. Let's speak of one for this purpose—would be to administer this test to job applicants or candidates for this type of position and then to make the decision as to whether to hire or not to hire these candidates on grounds other than their performance on the test.

In other words, the test would be administered, and only for try-out purposes anyway, and not as a basis for personnel decisions. After a sufficient number of persons had been hired so that one could have a fairly stable finding based not on just a handful of people, but a substantial sample of 25, 30, 50 people, one would then follow up their subsequent job history to see which—to see how well they measured up in terms of their actual job effectiveness, using one or more of these criteria of job performance to which I alluded earlier. And then one would statistically determine the degree of correlation between the scores

these candidates had had when they were initially hired with their subsequent history of job effectiveness to see whether the test is sufficiently valid. If the sample were ethnically heterogeneous as suggested by your question in making this analysis the members of the different ethnic groups should be analyzed separately to see whether the test is equally valid for the two or more ethnic groups involved. And at the same time, of course, these same data would provide a basis for determining what minimum score level is relevant to [differentiating,] those who experience showed turned out to be the more satisfactory employees from those who experience showed turned out were the less satisfactory.

I did mention there were two strategies. The first, the one that I have just been describing, is call predictive validation, for reasons that you can see, that is, that the test scores are not used as a basis for personnel decisions, but are just kept in the file, as it were, and later determination is made to see how well the scores of these people who—have predicted their future performance.

Now there is another strategy that is sometime followed for the sake of getting more rapid results, because this [aforementioned] predictive strategy is—obviously takes some time before the data can be developed. You have to hire enough people and let them be on the job long enough in order to get the data, and this may be a matter of a year or two years before you have a reading on how well the test is working, and if one, for practical reasons, feels it is necessary to have a prompter or quicker answer for the purposes of validity, then a second [strategy]—which is less desirable on technical grounds, but may be desirable on practical grounds—is adopted, and this is a strategy called a strategy of concurrent validity. That is, here, instead of applying the test to a sample of new job can-

didates, the test is administered on an experimental basis to a sample of current employees who occupy the job or jobs in question, and their scores on the tests are compared with records of their job capability so that the test scores and the criteria data are simultaneously available and could be compared at once, and, therefore, a quicker reading can be made. Technically, this is a less desirable procedure because whatever the process that was used in screening out employees and whatever the processes involved underlying the attributes of employees on the job, it may very well be that some employees who were potentially satisfactory have already been excluded from the sample because you are dealing with a current work group so you don't get as good a picture as you would with the predictive validity strategy.

Q If one selected the predictive analysis approach, would one in the profession begin with using the test as a means for employing persons or just get the test scores and make the determination to employ on some other basis, and then follow the employees to determine the minimum score that one would use? A It would be that latter. That is, ideally, the test should not—since it has not been proved out—should not be used as a basis for the employment decision but some other basis should be used.

Q Would that also be true, Dr. Katzell, of the concurrent approach? A Yes. It is needed in the concurrent approach because of course the personnel have already been employed on some other basis and, of course, the test data were probably not available for them at the time they were hired.

Q Now I gather that during this validation test that one might find that some of the attributes that one con-

sidered to be necessary, and considered necessary to be measured, would not be required for one to adequately—to perform the job? A That is correct. In other words, not infrequently we find that some tests that we thought measured a relevant attribute turns out not to be valid.

Q And one might also find that the test that one initially selected does not really meaure what is necessary for the job? A That is correct.

Q Now could you tell us something about the form of a cut-off score? I understood your testimony that during this validation test or analysis that one would come up with a cut-off score in the process. Now is this a hard and fast inflexible score that is generally used or does it have some flexibility, too? A It is generally not advisable to have a single hard, fast, inflexible score as a cut-off, the reason being that tests—even the best of them—are not a hundred percent accurate. In addition to this, there is the fact that virtually all test professionals will recommend strongly that tests not be used as the sole basis for a personnel decision, so that other factors should be taken into account and, therefore, that if there were strong [basis] from a person's previous work history, for example, that he was a competent employee and his test score was a little bit lower than that of some other [person's where] there wasn't much evidence that this person was a competent employee in terms of his previous job performance, you might give preference to the first of the two even though the test score may be lower, because you should be taking this other into account. So we usually think of ranges of acceptable test scores rather than some single, hard and fast score that is minimally accepted.

* * *

[DEP. PP. 50-53]

Q (Mr. Chambers) Now, Dr. Katzell, looking at the question of the possible discrimination between blacks in testing, would you tell us whether there are any other factors that the profession would take into consideration in selecting the type of test and the procedure that should be followed? You have testified earlier that if one were testing a heterogeneous group, that one might find it necessary to develop different norms for the various groups within it. Now, would you elaborate on that further and tell us why this would be necessary? A It has many times been shown that ordinarily the average score obtained by a group of black people in the United States are somewhat lower than the average scores obtained on the same test by a group of whites coming from the same general area of the country.

The reasons for this are not entirely clear and there are probably a number of reasons rather than just some one reason. Some of these reasons, however, may be of a sort which depressed the level of test performance off the average black without having a similar depressing effect on his actual job capability. For example, in many parts of the country, if not most, blacks obtain inferior schooling to whites, so that insofar as a particular test was likely to be affected by educational background, the black would be at a disadvantage. If the job were of a sort in which this kind of school learning was not particularly relevant, then you could see that the blacks as a group would tend to get poorer test scores without necessarily as a group being less adequate performers on the job. Blacks as a group tend to be particularly disadvantaged on verbal tests. Thus, again, would be—if it were a job that did not rely heavily on verbal skills, verbal aptitudes for adequate per-

formance, as is true in the case of many mechanically skilled occupations, the blacks might be disadvantaged as compared to whites.

It has also been found that blacks somehow do not do as well on tests, under some of the usual conditions that tests are taken, as do whites, and that if these conditions are changed, they might do relevantly better. For example, blacks particularly those in cultural backgrounds where they are not accustomed to having close working relationships with whites, seem to have their performance on tests adversely affected by a white examiner on the test perhaps because such an examiner is seen as a somewhat threatening or anxiety inducing figure even if he doesn't intend to be. Blacks—some studies of blacks have shown that they are not as responsive to performance of tests under highly speeded conditions, as many tests require; that is, where there are tight time limits and performance depends largely on how much you can accomplish within the short time allowed. Now, again this may not be something they carry over to the job if the job didn't have that kind of a counterpart to it.

I have just given illustrations then, and these are by no means exhaustive, of some of the circumstances that may be associated with lower average test performance of blacks as compared to whites that may have no particular counterpart in the actual job condition or job performance. And to the extent that this would [happen, your] empirical validation study, if one were to be performed along the lines that I have already prescribed, could very well show what I have called unfair discrimination, that is, depictive of the black applicant population tends to be lower in relation to this actual job capability than is true of a white population. And if a count were not taken of this difference,

the net effect of this could be disproportionate exclusion of otherwise qualified blacks.

* * *

[DEP. PP. 56-67]

A I wonder if I might comment, before I go on to your next question, on something you were asking a little bit ago and I realized I wanted to add something in the course of giving my comments that I forgot.

You were asking a little bit ago—I guess it was the question before this last set—about the—about some special considerations that might affect testing black people. And I was indicating that there are certain conditions that might depress test performance without necessarily affecting their job performance—was the general thrust of my response. In the course of this I indicated that the average black in most localities gets less adequate schooling, and for other reasons as well, is particularly handicapped in certain other verbal kinds of tests. It has sometimes been assumed that it is possible to avoid this disadvantage for the average black by using so-called culture free or culture fair tests, perhaps of a non-verbal nature or in other ways somehow not getting at things that are too closely related to school background and the other kinds of things that we think are characteristic of the cultural mainstream in this country.

I must say it is my judgment—and I think most psychologists would concur in this—that the search for culture free tests has so far not been successful. The attempt to use non-verbal tests, for example, has not proven a solution to the deficit in test performance that blacks show in relation to whites. Again, the reason is not necessarily that the black man is proportionately less capable than the white man, but it may be something linked specifically to performing on

tests. It may have something to do, for example, with the test environment as I have already explained. Blacks are less responsive to some of the speeded conditions, tend to be more anxious when confronted with an examiner, and so on, and this would be true whether it was a verbal test or a non-verbal test, but beyond the cultural deficit experienced by blacks in their educational background and in their home backgrounds that are related to educational kinds of considerations, transcend simply the disadvantages in using and understanding words because it carries over to a whole set of ability to cope with certain kinds of abstract relationships that are characteristic of the kinds of learnings and mental processes that go along with the advantaged dominant white culture and the kinds of schooling that we give our children. So, that the cultural disadvantaged, you see, is not—for a variety of reasons—is not evaded simply by taking a test that has relatively little verbal contact, because the mental processes involved in coping with verbal type materials can be present also in non-verbal materials.

To illustrate, there are tests such as are included in the specimens that we have been talking about that involve space relationships and you are supposed to match up certain kinds of figures. Well, one way of coping with these kinds of figures is to speak—is to put it in verbal terms, that is, this figure looks like a triangle and this figure looks like a square, and so on, and that in matching up, even though terms aren't verbal, the thought processes are rooted in words, and just by using the non-verbal terms you don't get around the problems of relying on mental processes that have symbolic verbal type aspects to them.

Q Dr. Katzell, you stated earlier that you had had an opportunity to examine some of the documents that have been gathered in connection with this case I think, including the testimony of Mr. Bryant, Mr. Moore, Mr. Palmer, in

addition to answers to interrogatories and other exhibits. Did you in your study of this case have an opportunity to find out the procedure that was followed at Albemarle Paper Company in the institution of the testing requirement there? A Well, the testimony of Mr. Bryant was—contained a fair amount of information about the procedures that were followed in installing the tests, so that—but that is the source of my information. And to the extent that that is an accurate picture of what was actually followed in the company, I think I do have some familiarity with it.

Q Did you find in your study of the procedure that was followed any difference in what you indicated was the normal accepted practice in the Profession? A Yes, sir. There were several respects in which—what I understand the procedure to have been, deviated from the kinds of standards that I have outlined in my earlier deposition.

Q Would you tell us what those deviations are, or were? A Well, of course, there were two different tests—there are two different tests used by the company, and somewhat different procedures, as I understand it, were followed in those two cases.

Let me take first the case of the Army Beta Test. Mr. Bryant referred to a validation study that was performed of that test in the company by, I believe, a Mr. Warren.

It was not clear, however, from his testimony, that there was ever the kind of systematic job analysis performed of those positions in question. And it is my understanding that there are no formal job descriptions that cover that set of jobs that is in existence. The procedure mentioned there of validation corresponds in a general way to what I have termed the concurrent validation procedure, that is, the test was administered to a sample of current employees

of the Albemarle Paper Company. Supervisors' ratings of some sort were obtained. And, according to Mr. Bryant's testimony, apparently it was found that there was some substantial degree of relationship between the scores on the tests and those ratings, although just how high that relationship was is not specified in the testimony.

The sample of positions covered in the validation study is not—likewise, not specified, other than reference to skilled people, to skilled jobs, so it is not entirely clear whether the jobs covered were all the relevant jobs or just some of them, which doesn't necessarily mean that it wasn't a properly conducted study. It just means that it is not clear that it [is] because—conceivably, because if the jobs covered did not adequately represent the range of positions for which the test is being used, then the finding that the test was valid in that set of jobs does not necessarily speak for its validity in the other jobs for which it is being used, you see.

Also, in another respect, the testimony suggests a departure from the standards that [I] have proposed here, and that since there were apparently practically no Negroes employed in those skilled jobs as of the time Mr. Warren conducted the study, we can assume that no separate validation or setting of cut-off scores was done for each of the two races, which would represent in my judgment an extremely important departure in view of the fact that the test is now being used to determine eligibility of Negroes for employment.

Now, with respect to the Wonderlic Personnel Test—

Q Let me go back to the Beta so that we can clear that up for the record, too. You said that the information shows also a deviation in the fact that there were no Negroes in the more skilled or more highly paid job categories and there was, therefore, no determinations, or could be no

determinations of the job performances of Negroes, so in layman's terms would you be saying that you don't have any validation of Negroes of the Beta Test in this plant in the more skilled or highly paying lines of progression? A To my knowledge that is correct. To my knowledge there is no information developed at this plant about the validity of the Beta [for Negroes] in any jobs.

Q In any jobs. A Incidentally, I don't know that there were no Negroes included in the sample. I judge from the information given that if there were some there were very few, so in any event the accuracy of the test—the validity of the test for Negroes as a group was never established.

Q And I think that in your earlier testimony you said that the concurrent approach of validation had some serious effects, also? A Yes, it is less desirable, but it doesn't—it is an acceptable method, although less desirable, but I think particularly the deviation comes here from the fact that really nothing can be said about the validity of this test for Negro candidates for these skilled jobs, and we are not even sure that the jobs covered in the validation study were the critical ones that are at issue with respect to providing skilled employment opportunities for Negroes in this company since the jobs covered in the study are unspecified.

Q You were beginning to tell us some of the deviations in the company's institution of the Wonderlic Test. A Yes, sir. Again, in the case of the Wonderlic there was no systematic—no reference to any systematic job analysis as a basis for deciding that a test like the Wonderlic would be appropriate to use. Moreover, the Wonderlic—moreover, there was no validation study conducted of the Wonderlic

in this company according to Mr. Bryant's testimony. So, in this case we not only don't know whether the test was valid for Negroes, but we don't even know whether it was valid for whites for this class of jobs in this company.

Furthermore, the cut-offs that were adopted—the cut-off, I should say. Singular. The cut-off that was adopted for the Wonderlic Test was established as near as I can determine from the testimony on the basis of what was referred to as national norms, that is presumable. In the norms that are provided by the publisher of the Wonderlic Test, they do provide some kinds of suggested cut-off for different kinds of occupations. So, I assume some effort was made to judge from that information provided the cut-off that was most nearly maybe comparable to the jobs in question here, and to adopt that. That is a highly questionable procedure, not only in—for the general reasons that I have indicated in my earlier testimony, namely, that cut-offs should be determined empirically on the basis of experience in a given company, but that it is widely known that cut-offs, even if they are established for somewhat similar jobs, somewhere else in the country, are not necessarily applicable to a given situation in a given plant. There may be sufficient differences in the way the jobs are set up, the work requirements, and so on, to make the cut-off established in Company "X" inaccurate when applied to Company "Y."

As a matter of fact, in Exhibit 5 that's been submitted, on the second page of that exhibit—if I may quote from Mr. Wonderlic's own statement, referring to cut-off scores or what he calls "minimum scores" here, he says and I quote: "However, there have been minimum scores"—I'm sorry. If I may—if you would strike that. I mean to start earlier in my reference. Let me quote here: "What is needed, is to establish passing or so-called critical scores for

various occupations. This should be done for each company since job titles are not completely descriptive. They are known to vary from plant to plant even within the same organization. Also, the critical score—the passing score—must be moved up or down, depending upon the available supply of applicants."

Paragraph. "However, there have been minimum scores established in many industries which give some basis for the experimenter to check against."

Paragraph. "A skilled industrial psychologist will undoubtedly find variations from this table in studying any particular group and because of this, the author hesitates to furnish these norms." Period. End of quotation. Which is simply, again, a restatement of what I had already indicated, that it is widely recognized, and in my judgment even recognized by the statement of Mr. Wonderlic, that it is hazardous to adopt minimum scores or critical scores or cut-off scores from persons in other companies and other organizations and try to use that as a basis for setting passing scores in one's own company.

Q Did you find any additional deviations in the Wonderlic Test? A Well, of course, again, the central point —since no validation study was conducted, we have no evidence of whether the test operates in a discriminatory fashion for blacks in relation to whites.

Q Now, when you speak of no information on whether it operates in a discriminatory fashion, you are talking about whether its use at the Albemarle Paper plant operates in a discriminatory fashion? A That's correct.

Q Because there's been no test by the plant to determine — A That's correct.

Q Did you have any additional deviations by the company in instituting the test that in effect violated the major principle of a local empirical study of the test. A In effect, many specifics were violated, but that general criticism of mine really is the core of it and there is no need to specify all of the details which therefore are overlooked there by this failure.

Q In short, then, there was, first of all, no information about a job analysis—the first point you mentioned? A Was necessary in order to determine the validity of a test, the suitability of a test, yes.

Q And the second point being, in the Wonderlic there was no validation at all? A Correct. Even in the Beta, where there was apparently a local validation, no separate analysis was made to whether the test worked in a valid and non-discriminatory fashion in relation—with Negroes in relation to whites.

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[DEP. PP. 72-76]

Examination By Mr. Lowden:

* * *

Q (Mr. Lowden) Several times today you have mentioned that you worked for St. Regis Paper Company. Would you tell us in what capacity? A Yes. I served as a consultant to them in connection with my position as Director of the Psychological Services Center of Syracuse University. St. Regis Paper engaged us to assist them in setting up a selection test for factory operators in their bag division.

Q And when was this approximately? A Approximately 1950.

Q 1950. A '51—somewhere in there.

Q Did you set up some tests for St. Regis Paper Company? A Yes, we did.

Q What tests were they? A These were largely dexterity and performance tests.

Q You did not set up any intelligence tests? A No, not to my recollection, it did not include intelligence tests.

Q Do you recall the names of the tests you set up? A Some of them constructed by us, if I recall correctly, and others—I don't remember the names of them. I believe we used some of the Purdue University series. They have several manual and dexterity tests. And I believe some of those were included, but I must say I haven't checked my records on this recently and my memory isn't that good.

Q And the bag division at St. Regis Paper Company is located where? A Well, they have several plants. The two that we particularly studied were at Franklin, Virginia, and Pensacola, Florida.

Q Would you explain to us how you validated those tests? A Essentially, by the methods that I have described, that is, we did do job analysis of the positions in question. On this basis we inferred some of the coordination dexterity factors, mechanical factors, in doing the jobs. We did a concurrent validity study in the sense that we applied these tests to samples of current employees in those positions. We had the data on the effectiveness of the employees in performing these jobs and ran correlations between them and from those tests that were valid determined

some desirable ranges of scores for employing new applicants.

Q Did you validate it by races? A We did not, sir. To the best of my recollection these positions were occupied only by whites at that time.

Q So in 1950 at St. Regis you did the same thing that Albemarle Paper Company did several years later and did the best they could with what they had at the time—right?

Mr. Chambers: I object to that.

A Right.

* * *

Q (Mr. Lowden) All right. Well, if you—if there were no Negroes there today how would you validate it for the two groups? A The validation for Negroes would have to be done on one of these predictive strategy—the predictive strategy that I mentioned.

Q In other words, what you're saying to me, you think that the company should hire just a bunch of people and see how the test worked out and later—from there? A Well, I don't know what you mean by "just." If you would exclude that word, I'd say: yes, I think the company should hire—

Q Hire some Negroes and give them the tests and hire them anyway and see how the tests score? A Right. And in doing so, not ignore other kinds of information that might bear on the eligibility of the candidates for employment. As a matter of fact, if these were tests that, based on information from some roughly parallel situation, might be presumed possibly to have validity in this situation, I would not even be adverse to using a liberal cut-off even

with the test before they had been fully validated, and I have so advised clients, but the cut-off should be extremely liberal to avoid unfair exclusion of some people, many people who might be really qualified, and, also for technical reasons to provide enough range of test scores so one can check out and see what the proper cut-off score really should be.

* * *

[DEP. PP. 79-82]

Q Okay. Now, all afternoon, Doctor, you have been talking about ethnic groups. And it is my understanding that this belief that you have that some people don't do as well on tests as others is not limited to ethnic groups; there may be differences within each ethnic groups. And, really, what you're talking about is people who are culturally deprived—I believe the words are—rather than a specific race. In other words, there's white people, if they are culturally deprived, who don't do as well on these tests either? A That is correct.

* * *

Q So what you're doing is distinguishing between the culturally deprived people and those who have had the benefits of good up-bringing and schooling, and so forth, basically? A Well, I think we are saying two things. One is that we are referring to cultural disadvantage as the factor that may depress test performance, and not a man's skin color or his biology. But I think we are saying another thing as well: that in the United States, in most localities, that more Negroes are culturally deprived, and other ethnic minority as well—including Puerto Ricans, American Indians, and so on—that is true of whites as a matter of

proportion, and if one were to take a sample of Negroes in New York City—and, I dare say, Roanoke Rapids, North Carolina—a random sample of them, that one would find more of them culturally deprived than a random sample of whites.

Q But you would not know that unless you actually took a sample? A I wouldn't know that about a specific location.

Q You mean a specific location. And you would not know about the people who apply for employment at our mill unless you actually studied those people? A That is correct.

Q Let me see if you will agree with me. Will you agree that race, per se, will cause a differential on an intelligence test, that fact alone—race? A Would you read it, please?

(Question Read)

A I am not sure I understand the question, sir. You mean for a given individual?

Q For a given individual. A For a given individual? Now, may I ask you for your definition of "race"?

Q Let's say the color of the skin. A The color of the skin. For some individuals the answer might be: no, but for others it might be: yes. If you want me to explain that answer, it will take another one of those lectures that you objected to before.

Q The Negroes. A Clearly, you know I know the manifest point of your question, and I am not saying I am saying that the fact that a man's skin is black or white is not itself the immediate cause of his intelligence and, obviously, the answer—I would agree with that point. But causality is

a sequential thing very often and, therefore, it depends on what you mean by causality and so on.

Q Let's get—as far as I am concerned, if you want to make a ridiculous answer, I will be satisfied with it. A If you want one, I will be glad to give you a lecture, but that will probably take about a half an hour.

Q Now we have already had a psychology course. A I wonder if I could give you just one minute of my lecture.

Q Off the record or on? A It could be on. The point I wanted to make: that race can cause—can be a factor causing an individual's intelligence test score to be at a certain level insofar as he has been treated by society on the basis of his skin color, so that by a chain of indirect causations race may cause—may account for his intelligence performance.

* * *

[DEP. PP. 84-87]

Q And, then, still in 1950—I think it was 1954 or 1955—it would not be unreasonable for an employer to have reached the conclusion that the high school education doesn't work because some of the courses they teach in high school—I think your testimony in your case is baton twirling—to try to find a task that would disclose whether or not the high school diploma the man had meant something; that would not be an unreasonable thing to do, would it? A No.

Q It would particularly not be unreasonable if your personnel manager was a major psychological—one of his fields of study had been psychological testing. Would it not be normal to ask him to go into the matter and see if he

could come up with a test? A To see if he could come up with a test? Yes, it would be quite a normal thing.

Q If you had an employee who had a degree in psychology in all but one—I think had all of his courses completed but about one hour to a degree of PhD in psychology at Purdue University, would you not think he was reasonably capable of conducting a validation test study? A Yes, I would.

Q If—at that time would it not have been reasonable for that person, in making this judgment that you talk about, that you first make when you are looking for tests, wouldn't the Beta have presented itself as one of those that he might well have considered? A I don't think I can answer this because I don't know these jobs well enough.

Q Well, he was trying to—let me ask you this: don't you think that management has the right in its judgment to decide that we would like to have people in our organization to run our equipment who have approximately an average I.Q.? Isn't that a reasonable requirement, if you're going to put a man, say, on a seventy million dollar piece of equipment, in charge of it? A Again, I think it depends—you're asking me the—your question is based on the responsibilities of the job that I just have no first-hand knowledge of.

Q I'm asking you this: it is not beyond the realm of reasonableness to conclude I need a high school man? A That's right. Don't misunderstand me. I'm saying on a professional basis I can't say it is reasonable because I don't know the job. I can say it doesn't strike me as unreasonable. I can see how conceivably it is reasonable.

Q Wouldn't you say that management has a discretion, providing that they have no ulterior motive, why can't they

say: we want all high school graduates? It may be wrong from your point of view, but why can't they say—what is unreasonable about saying we need all people to be high school graduates? A It is unreasonable if it excludes from employment a segment of the population which might otherwise be qualified to do the job.

* * *

[DEP. PP. 90-95]

Q What would you say a score of 100 on a Beta test would represent? A You mean the I.Q. equivalent of 100.

Q And would that be about the average I.Q. for the country? A That is the average I.Q. for the country.

Q What is wrong—or I will put it a different way. What [is discriminatory if it is not job-relevant] by having a requirement that your employee have at least the average I.Q.? A In my judgment it is discriminatory [if it is not job related].

Q That is, about it not being related to the job. I want to know what is discriminatory in saying I want a person with average intelligence. Does that discriminate with that? Do you agree with this other gentleman whose article, I've got here, that was recently published? A Again, I would say that it is discriminatory if it excludes from the job people who could perform the job as well as those who have an I.Q. of a hundred.

Q Well, that is not answering my question.

* * *

Q (Mr. Lowden) I want to know, leaving aside whether or not it is a good predictor or good performance that you

keep talking about, I want to know why is the requirement or how can the requirement that you have an average intelligence of all the people in the United States, how that can discriminate against anybody, per se? What is discriminatory about that? A If you will forgive me, if I think for a moment, because I keep coming up with the same answer that I gave you before, which apparently didn't communicate to you, so I am trying to think of another way of saying it. Let me see if I can answer it in—first, in general terms. To me discrimination means barring an individual from employment on the basis of some value judgment that is not relevant to his job performance.

Q But supposing my bona fide belief is I need somebody of average intelligence, so—it is my business, so I make a decision that is what I want; I'm going to pay them? A That is your value judgment if you want intelligent people.

Q That's right, and I want to know what is discriminatory about it? A Again, I come back to the point it is discriminatory by my definition.

Q By your definition? A By my definition if it is on grounds that represent your personal preference, that is not relevant to the individual's actual capacity to do the job. To generalize, you know I might have a preference for incumbents, say who are men rather than women. This is my preference, but if a woman is qualified to do the job and I exclude her from it, then I think she's got a legitimate right.

Q So you're telling us that you think the Court in this case ought to determine for the management what kind of employees they need and tell us that we can't have people with high school educations; we can't have people with nor-

mal I.Q.'s. Isn't that the logical result of what you're saying? A No, sir, I don't believe so. I don't believe that I am arguing that Court or anyone else should tell you what kind of job performance is relevant to accomplishing the aims of your client's business. That I think is up to the client. But I think the Court—but I think I at least can counsel you that if you want this kind of job performance, then for crying out loud, don't exclude people who can give you that performance on irrelevant grounds.

* * *

Q So I am going to question you from the one that I happened to look at yesterday, which is the report to the Ford Foundation. In your Chapter I, Historical Perspective, in your report on Differential Selection Among Applicants from Different Socio-economic and Ethnic Backgrounds, on page 8, and talking whether or not there is a difference in test scores but performance on the job, you concluded it would seem that is something in the way of ideas, but little in the way of evidence regarding possible unfair discrimination in industrial selection. The purpose of the present research is to obtain and evaluate such evidence. Do you remember having used that language? A It sounds familiar.

Q So that in 1967 you said there was no evidence; there were a lot of ideas? A Little evidence.

Q Little evidence to support your theory that some people did poorly on tests but performed well, is that correct? A That wasn't our theory, incidentally, but to support the issue, you know, to eliminate the issue of whether in fact such possibility existed.

Q Now what evidence, other than your report of May, 1967, is there to support this thesis? There is very little in

1967, it said, and not much more— A That's right. Somewhat more, but still not a great deal. That is true.

* * *

[DEP. PP. 97-109]

Q You had a little problem, didn't you, because when Title VII was passed in 1964 one of the first things EEOC did was issue regulations that you could no longer designate the people in your employment file as being one race or another, so that they thought that the law—you couldn't do this, isn't that right? A That's right. There's been some revision of thinking subsequently on this, and it is now—

Q But the meaning of the law hasn't changed though, has it? A It is now my understanding, in part, as a result of findings like this—

Q You wrote them a note and said: you guys don't know what—what you're talking about, isn't that what you did? A I think so. We said in effect the intent of excluding ethnic groups from application was a good intent; it could backfire by not allowing ethnic considerations to enter into the proper interpretations of tests, and it is now—it is my understanding from the legal authorities in the United States Goverement that where ethnic considerations are to be known, are to be taken into account as a part of validation tests, to be sure that they are job relevant, but it is not illegal to acquire such evaluation.

* * *

Q So that would it be fair to conclude that in your opinion it would be—that as far as our mill at Roanoke Rapids is concerned, it would be better to keep on using the

tests we got rather than to abandon them altogether? A That conclusion doesn't follow from my previous statement.

Q Do you not think that the tests that we now have are more objective than if we turned the matter over to some personnel man to use his subjective instincts as to who is going to be a good employee or a bad employee? A Yes, they are more objective. They are not necessarily discriminatory.

Q What? They are not necessarily discriminatory at all? A Correct.

Q How many people do you think should be in a group in order to be an adequate sample to validate a test? A That—the answer to that is unfortunately, not as simple as one might like to have it, because it depends on several things. It depends, for example, on the variety of jobs that are going to be covered in the sample. If you have just one job, then the samples should be large enough to yield a statistically reliable result for the degree of validity that you will find practical and useful in your company. Now I can give you some illustrations of that.

Q Give us a range, from—five hundred or what? A I will give you a figure that might be sort of a ball park figure. Give me a moment for calculation here . . . I would —to give you—to answer your question, for a single job, a sample—ordinarily a sample of somewhere around 50 would be an adequate sample.

Q I believe in this study that you made for the Ford Foundatic vou were associated with Mr. Richard S. Barrett? A Correct.

Q Dr. Barrett—I guess I should say? A Yes.

Q And was Dr. Barrett sort of in charge of that? A He was the principal investigator on the study.

* * *

Q All right. He says, "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." Do you agree with that? A "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." Yes, if I understand the general—by "special" I presume he means—

Q It is right there. A Yes, I think I agree with the sense of that.

Q All right. If you agree with that, then will you please tell me, going back to my previous question, what special obstacle is put in the path of a Negro by asking him to have average intelligence? A As measured by a specific test?

Q Yes. A Because as soon as you qualify it with that, sir, you do place a special obstacle.

Q How? A Because the average Negro does not come up to the average white norm on which these tests are based.

Q Didn't you testify— A And the moot question is whether this is functionally related to his ability to perform on the job or whether that is—

Q That is your explanation? A Excuse me. Let me finish.

Q That is not the question I asked you. A Or whether it is—it is artifact of the test instrument which was used to determine his intelligence. If the test instrument were in fact equitable and non-discrimintaory, then it

would represent no special obstacle, but if the test instrument has in it a built-in barrier to Negroes achievements to the same scores as white, then it would be discriminatory.

Q Now we started out this morning, you and I, and started talking about the Beta Test. Are you telling us now that the United States Government in World War I was trying to devise a discriminatory test? They were trying to do exactly the opposite, weren't they; they were trying to devise a test to measure the intelligence of illiterate people? A Of illiterates, yes. Incidentally, it was not just a racial issue, because at the time of World War I there were many, many illiterates, including may whites, so it was not a racial issue.

Q So the Beta Test was a test to try to really be objective and non-discriminatory? A Right.

Q And you testified, I'm pretty sure, that there was a high correlation between the results of the Beta Test and the individual I.Q. test, such as the Otis? A The Otis is not an individual I.Q. test, by the way. It is an intelligence test.

Q So I'm asking—I will ask my question one more time. What special obstacle in the path of Negro employees is there in asking them to get an average I.Q. score on the Beta Test? What is discriminatory about that?

Mr. Chambers: May I ask for clarification of that question: are you talking about—what is discriminatory—for Roanoke Rapids to ask the residents of Halifax County to have an average I.Q.?

Mr. Lowden: I'm not asking—

Mr. Chambers: I just thought there ought to be some clarification of the question.

Mr. Lowden: I will clarify the question one more time.

Q (Mr. Lowden) He says he agrees with the statement —with his associate, Dr. Richard S. Barrett, and that statement is: "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." There is then no civil rights issue involved; we have established that the Beta Test is not discriminatory—

Mr. Chambers: Wait a minute. We have not established that the Beta Test is not discriminatory.

Mr. Lowden: We have established that the Beta Test measures I.Q. It was established I think and agreed to, that the Government of the United States was trying to find a non-discriminatory objective test to give to illiterate people.

Q (Mr. Lowden) And my question is: tell me how the Beta Test is a special obstacle to Negroes? A I am not going to state for a fact, Mr. Lowden, that it is a special obstacle because I think that if you will recall the entire burden of my testimony has not been that we know that these procedures that you have been following are in fact irrefutably discriminatory. We have simply indicated that there is a reasonable foundation to that, that they may be discriminatory. Now, if you will bear with me on this—

Q I will bear with you to this extent: I think you have been very careful all afternoon, and I appreciate it and I think it is right, to say it may be, it could be; there is no evidence it might be but there is no evidence that it in fact is, and there is no evidence here that we in fact intend it to be—go ahead.

Mr. Chambers: That is your position. We don't know about the last statement, about whether it was intended to be. It is not shown in the record. That is your opinion of the evidence in the record.

Mr. Lowden: That is the evidence in the record.

A Now, with that context in relation to your present question, we know that I.Q. tests, intelligence tests like the Otis and Wonderlic, in the various majority of instances where comparable samples of Negroes and whites have been compared, tend to result in lower average scores for the Negroes than for the whites. While I don't know of such data specifically on the Beta for sure, I think there is this, but my memory is not that clear on this at the moment. The fact that the Beta correlates high with the Otis would certainly suggest the same thing would be true for the Beta. We know of instances where Negro samples scoring lower on the average than white samples in an employment situation in fact have not proven to be less satisfactory employees.

Q But that is not the point. A Excuse me. I am leading up to my point. So that, in a given situation, if all of these circumstances were true, then a larger proportion of Negroes taking the Beta for employment at your Roanoke Rapids plant might well get lower scores than is true of the white applicants for that plant, and in that event—again, understand, if all those circumstances were true, it would in fact be discriminatory against the Negroes. I say if those things are true. I don't know that they are true of your situation, as I have said before, but they might well be true, and there are many, many data that suggest there is a good probability that they might be true.

Q Let me ask you this: you have two people to come down to the employment office; one of them gets 95 on the Beta Test and he is Negro, and the other one gets 120 and he is white. Is is not discrimination against the white man to give the job to the man who gets a 95 I.Q.? Why

shouldn't that man have the job; he's got a higher I.Q. It's discrimination in reverse—what you're arguing for—is it not? A No, there is nothing in which I have said thus far that has argued for discrimination in reverse, because if your study would show that the Negro with a score of 95 can do the job as well as the white man with 120, then I would say there is no discrimination in reverse, in either direction.

Q Then why should the Negro get the job and the white man be turned down, if both of them can do the job and the white man has the higher I.Q.?

* * *

Q (Mr. Lowden) Well, you're talking about job performance and job related tests. I will go this far with you: one of the plaintiffs in this case was hired to drive a mule—years ago—I don't think he could read or write, but he was a mule driver. Now I suppose that if you and he both took the Beta Test, you would come out much better than he would, but I bet he would be the better mule driver—than you are? A I wouldn't be a bit surprised.

* * *

PLAINTIFFS' EXHIBIT NO. 69

Barrett, Richard S.

Born, 1924, Married, 3 Children

5 Riverview Place
Hastings-on-Hudson, N. Y. 10706
914 - 478-1302

Educational Background:

1948—B.S., Administrative Engineering, Cornell University

1951—M.A., Education, Syracuse University

1956—Ph.D., Industrial Psychology, Western Reserve University

Work History:

1969 to Date—Assistant Director for Educational Research, Center for Urban Education, New York. Direct research on education of urban children, primarily educationally deprived pupils in the elementary grades.

1968 to 1969—Senior Associate, Case and Company, Inc. Consultation in personnel and industrial psychology, education, fair employment practices.

1965 to 1967—Director, Materials Evaluation, Science Research Associates, Inc. Developed staff of applied educational research psychologists. Supervised investigations into computer assisted instruction, reading, mathematics and science programs, and a wide variety of studies in the education of typical and atypical students from kindergarten through junior college.

1965 to 1967—Research Associate Professor of Psychology, New York University. Principal Investigator "Differential Selection Among Applicants From Different Socio-Economic and Ethnic Backgrounds." This research has shown that employment tests do not necessarily have the same meaning for minority groups as for the groups for which they were developed.

1958 to 1965—Assistant to Associate Professor of Management Engineering and Psychology and Program Director, Research Center for Industrial Behavior, New York University. Supervised research on the significance of perceptions of job performance and job requirements and on the effectiveness of training. Consultant to several corporations.

1955 to 1958—Vice-President of Personnel Research and Development Corp., Cleveland, Ohio. Consulted with industry, conducted research in selection and performance rating.

Earlier Positions—Research Associate, Operations Research Group at Case Institute of Technology. Professional Associate, Richardson, Bellows, Henry & Co., New York. Industrial Engineer, Liberty Products Corp., Farmingdale, New York.

Professional Societies:

American Psychological Association
Member—1953 to Date
Education and Training Committee, Division 14
Chairman—1960-1961
Member—1960-1963

Eastern Psychological Association
Member—1957 to Date

Registration Chairman—1959-1960
Placement Chairman—1962-1963

American Educational Research Association
Member—1965 to Date

New York State Psychological Association
Member—1958 to Date
Board of Directors—1962-1963

Metropolitan New York Association for Applied Psychology
Member—1958-1965
President—1963-1965

Honorary Societies:

Phi Delta Kappa (Member)
Alpha Pi Mu (Member)

Certification:

Certified Psychologist, New York State, 1958-date

Diploma:

Diplomate in Industrial Psychology, American Board of Examiners in Professional Psychology, 1962

Community Activities:

Trustee, Board of Education, Dobbs Ferry, 1962-1965

Selected Publications:

with Taylor, E. K., Parker, J. W., and Martins, L. Rating Scale Content I. Scale Information and Supervisory Ratings. Personnel Psychology, 1958, 11, pp. 333-346.

with Taylor, E. K., Parker, J. W., and Martens, L. Rating Scale Content II, Personnel Psychology, 1958, 11, pp. 519-534.

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with Feinberg, M. R., Balinsky, B., Garber R., Ruch, F., and Steckel, L. Outside Consultants to Industry: Strengths, Problems, and Pitfalls (A Symposium). Comments on the Symposium. Personnel Psychology, 1964, 2, pp. 128-133.

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with Kirkpatrick, J. J., Ewen, R. B., and Katzell, R. A. *Testing and Fair Employment.* New York, New York University Press, 1968.

The Computer Mentality Phi Delta Kappan, April, 1968, pp. 431-435.

PLAINTIFFS' EXHIBIT NO. 70

List of Cases in Which Barrett Testified

Richard S. Barrett

Activity in Fair Employment Practice Cases
(April 1971)

Testimony, Depositions, or Affidavits

Colbert v. *H-K Corporation,* C.A. No. 11599 (N.D. Georgia, filed February 27, 1968) (Deposition) (Appealed)

Griggs v. *Duke Power Company,* 291 F. Supp. 243 (M.D. N.C. 1968), Rev'd No. 13,013 (4th Cir. January 9, 1970) (Won in the Supreme Court)

Hart v. *Buckeye Industries, Inc.,* C.A. No. 702 (S.D. Georgia, filed March 27, 1968)

U.S. v. *Frazer,* 297 F. Supp. 319 (M.D. Ala. 1968) (Won)

U.S. v. *H. K. Porter,* 59 Lab. Cas. Paragraph 9204 (M.D. Ala. 1968) (Appealed)

U.S. v. *Jacksonville Terminal,* Civil No. 68-239 Civil-J (April 16, 1970) (Appealed)

Chance v. *Board of Examiners,* (1970) (Affidavit)

Davis v. *Washington,* (1970) (Affidavit)

Allen v. *City of Mobile,* (1970) (Scheduled May 25, 1971)

Castro v. *Beecher,* (Mass. Civil Service Commission) (1970) (Scheduled April 26, 1971)

Griggs v. *Wilson Sinclair,* (Iowa Human Rights Commission) 1971

Consultation

Barnaba v. *Rohm-Haas,* C.A. No. 68-H-257 (S.D. Texas, filed March 22, 1968)

Schrichte v. *Eastern Airlines,* (sex discrimination) (1970)

Allen Bradley, (OFCC hearing) (1968)

U.S. v. *Metal Lathers Union,* (1969)

Harding, (N.Y. FEPC hearing) (1969)

Pettway v. *American Cast Iron Pipe Company,* (1970)

Williams v. *Diamond Shamrock Chemical Company,* (1971)

Douglas v. *Hampton,* (U.S. Civil Service) (1971)

New York Commission for Human Rights, (Hearing) (1969) (1971)

U.S. v. *Georgia Power Company,* (1971)

PLAINTIFFS' EXHIBIT NO. 71

Standards for Educational and Psychological Tests and Manuals

Prepared by a joint committee of the
American Psychological Association
American Educational Research Association
National Council on Measurement in Education

Cochairmen: JOHN W. FRENCH and WILLIAM B. MICHAEL

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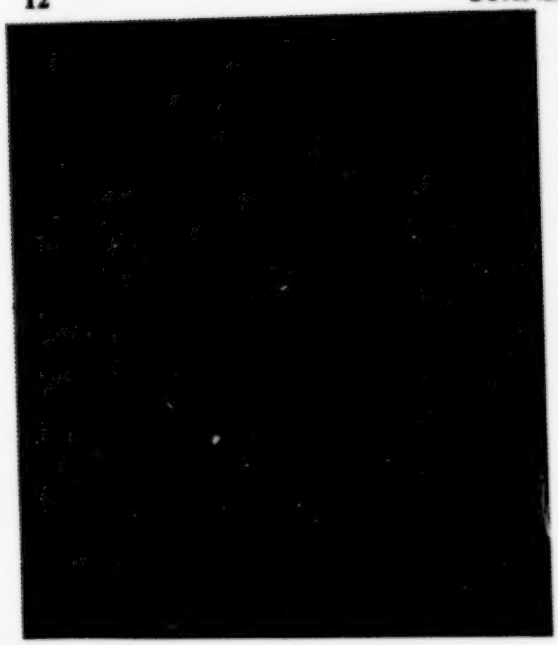

C. Validity

Validity information indicates the degree to which the test is capable of achieving certain aims. Tests are used for several types of judgment, and for each type of judgment, a different type of investigation is required to establish validity. For purposes of describing the uses for three kinds of validity coefficients, we may distinguish three of the rather numerous aims of testing:

1. *The test user wishes to determine how an individual performs at present in a universe of situations that the test situation is claimed to represent.* For example, most achievement tests used in schools measure the student's performance on a sample of questions intended to represent a certain phase of educational achievement or certain educational objectives.

2. *The test user wishes to forecast an individual's future standing or to estimate an individual's present standing on some variable of particular significance that is different from the test.* For example, an academic aptitude test may forecast grades, or a brief adjustment inventory may estimate what the outcome would be of a careful psychological examination.

3. *The test user wishes to infer the degree to which the individual possesses some hypothetical trait or quality (construct) presumed to be reflected in the test performance.* For example, he wants to know whether the individual stands high on some proposed abstract trait such as "intelligence" or "creativity" that cannot be observed directly. This may be done to learn something about the individual, or it may be done to study the test itself, to study its relationship to other tests, or to develop psychological theory.

Different types of tests are often used for each of the different aims, but this is not always the case. There is much overlap in types of tests and in the purposes for which they are used. Thus, a vocabulary test might be used (*a*) simply as a measure of present vocabulary, the universe being all the words in the language, (*b*) as a screening device to discriminate present or potential schizophrenics from organics, or (*c*) as a means of making inferences about "intellectual capacity."

To determine how suitable a test is for each of these uses, it is necessary to gather the appropriate sort of validity information. The kind of information to be gathered depends on the aim or aims of testing rather than on the type of test. The three aspects of validity corresponding to the three aims of testing may be named content validity, criterion-related validity, and construct validity.

Content validity is demonstrated by showing how well the content of the test samples the class situations or subject matter about which conclusions are to be drawn. Content validity is especially important for achievement and proficiency measures and for measures of adjustment or social behavior based on observation in selected situations. The manual should justify the claim that the test content represents the assumed universe of tasks, conditions, or processes. A useful way of looking at this universe of tasks or items is to consider it to comprise a *definition* of the achievement to be measured by the test. In the case of an educational achievement test, the content of

the test may be regarded as a definition of (or a sampling from a population of) one or more educational objectives. The aptitudes, skills, and knowledges required of the student for successful test performance must be precisely the types of aptitudes, skills, and knowledges that the school wishes to develop in the students and to evaluate in terms of test scores. Thus evaluating the content validity of a test for a particular purpose is the same as subjectively recognizing the adequacy of a definition. This process is actually quite similar to the subjective evaluation of the criterion itself. Unless, however, the aim of an achievement test is specifically to forecast or substitute for some criterion, its correlation with a criterion is *not* a useful evaluation of the test.

Criterion-related validity is demonstrated by comparing the test scores with one or more external variables considered to provide a direct measure of the characteristic or behavior in question. This comparison may take the form of an expectancy table or, most commonly, a correlation relating the test score to a criterion measure. Predictive uses of tests include long-range forecasts of one or more measures of academic achievement, prediction of vocational success, and prediction of reaction to therapy. For such predictive uses the criterion data are collected concurrently with the test; for example, when one wishes to know whether a testing procedure can take the place of more elaborate procedures for diagnosing personality disorders. A test that is related to one or more concurrent criteria will not necessarily predict status on the same criterion at some later date. Whether the criterion data should be collected concurrently with the testing or at a later time depends on whether the test is recommended for prediction or for assessment of present status.

Construct validity is evaluated by investigating what qualities a test measures, that is, by determining the degree to which certain explanatory concepts or constructs account for performance on the test. To examine contruct validity requires a combination of logical and empirical attack. Essentially, studies of construct validity check on the theory underlying the test. The procedure involves three steps. First, the investigator inquires: From this theory, what hypotheses may we make regarding the behavior of persons with high and low scores? Second, he gathers data to test these hypotheses. Third, in light of the evidence, he makes an inference as to whether the theory is adequate to explain the data collected. If the theory fails to account for the data, he should revise the test interpretation, reformulate the theory, or reject the theory altogether. Fresh evidence would be required to demonstrate construct validity for the revised interpretation.

A simple procedure for investigating what a test measures is to correlate it with other tests. We would expect a valid test of numerical reasoning, for example, to correlate more highly with other numerical tests than with clerical perception tests. Another procedure is experimental. If it is hypothesized, for example, that form perception on a certain projective test indicates probable ability to function well under emotional stress, this inference may be checked by placing individuals in an experimental situation producing emotional stress and observing whether their behavior corresponds to the hypothesis.

Construct validity is ordinarily studied when the tester wishes to increase his understanding of the psychological qualities being measured by the test. A validity coefficient relating test to criterion, unless it is established in the context of some theory, yields no information about *why* the correlation is high or low, or about how one might improve the measurement. Construct validity is relevant when the tester accepts no existing measure as a definitive criterion of the quality with which he is concerned (e.g., in measuring a postulated drive such as need for achievement), or when a test will be used in so many diverse decisions that no single criterion applies (e.g., in identify-

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ing the ability of Peace Corps trainees to adapt to new cultures). Here the traits or qualities underlying test performance are of central importance. It must be remembered, however, that, without a study of criterion-related validity, a test developed for diagnosis or prediction can be regarded only as experimental.

These three aspects of validity are only conceptually independent, and only rarely is just one of them important in a particular situation. A complete study of a test would normally involve information about all types of validity. A first step in the preparation of a predictive *(criterion-related)* instrument may be to consider what *constructs* are likely to provide a basis for selecting or devising an effective test. Sampling from a *content* universe may also be an early step in producing a test whose use for *prediction* is the ultimate concern. Even after satisfactory *prediction* has been established, information regarding *construct* validity may make the test more useful; it may, for example, provide a basis for identifying situations other than the validating situation where the test is appropriate as a predictor. To analyze *construct* validity, all the knowledge regarding validity would be brought to bear.

The three concepts of validity are pertinent to all kinds of tests. It is the intended use of the test rather than its nature that determines what kind of evidence is required.

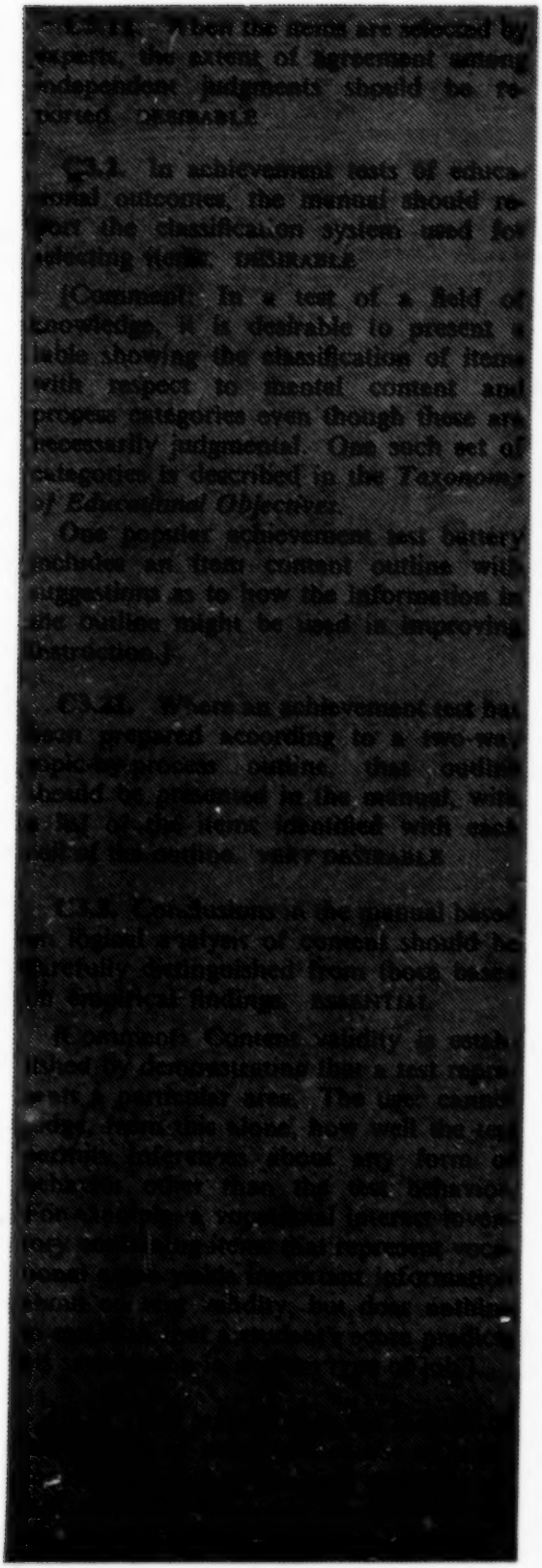
Intelligence or scholastic aptitude tests most often use criterion-related validity to show how well they are able to predict academic success in school or college, but the nature of the aptitudes measured is often judged from the content of the items, and the place of the aptitude within the array of human abilities is deduced from correlations with other tests.

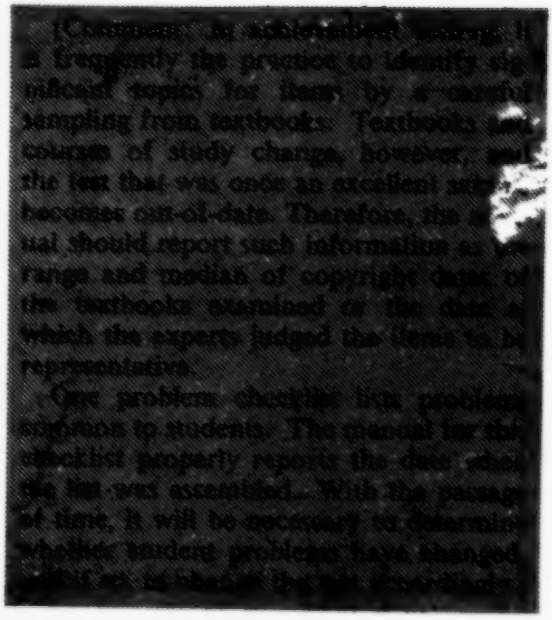
For achievement tests, content validity is usually of first importance. For example, a testing agency has a group of subject-matter specialists devise and select test items that they judge to cover the topics and mental processes relevant to the field represented by the test. Similarly, a teacher judges whether the final test in his course covers the kinds of situations about which he has been trying to teach his students certain principles or understandings. The teacher also judges content when he uses a published test, but he can appropriately investigate criterion-related validity by correlating this test with tests he has prepared or with other direct measures of his chief instructional objectives. When the same published achievement test is used for admissions testing, it may reasonably be checked against a later criterion of performance. In any theoretical discussion of what is being measured by the achievement test, a consideration of construct validity is required. Whether the score on a science achievement test, for example, reflects reading ability to a significant degree, and whether it measures understanding of scientific method rather than mere recall of facts are both questions about construct validity.

Development of a personality inventory will usually start with the assembly of items covering content the developer considers meaningful. Such inventories are then likely to be interpreted with the aid of theory; any such interpretation calls for evidence of construct validity. In addition, a personality inventory must have criterion-related validity, if, for example, it is to be used in screening military recruits who may be maladjusted.

Interest measures are usually intended to predict vocational or educational criteria, but many of them are also characterized by logical content and constructs. This makes it more likely that they can provide at least a rough prediction for the very many occupations and activities that exist and for which specific evidence of criterion-related validity has not been obtained.

For projective techniques, construct validity is the most important, although criterion-related validity using criteria collected either concurrently with the testing or afterwards may be pertinent if the instruments are to be used in making diagnostic classifications.





Criterion-Related Validity

C4. All measures of criteria should be described completely and accurately. The manual should comment on the adequacy of the criterion. Whenever feasible, it should draw attention to significant aspects of performance that the criterion measure does not reflect and to irrelevant factors that are likely to affect it. ESSENTIAL

[Comment: Desirable practices are illustrated in a manual for a test designed to measure abstract intelligence. Several validity studies relating this instrument to criteria are reported, some involving concurrent measures and others involving predictions over periods of time. Limitations of the studies are recognized and it is stated that "no one criterion is uniquely appropriate." The value of local norms is stressed and an example of a local expectancy table is provided.

In the case of interest measures, it is sometimes not made clear whether the criterion indicates satisfaction, success, or merely continuance in the activity under examination. When criterion groups include men in a given occupation and when a comparison of such groups is made to men-in-general, the manual should point out the distinction between

presence in an occupation and success in it or satisfaction with it.]

C4.1. The manual should report the validity of the test for each criterion about which a recommendation is made. If validity for some recommended interpretation has not been tested, that fact should be made clear. ESSENTIAL

C4.2. For any type of prediction the manual should report test-criterion correlations for a variety of institutions or situations. Where validity studies have been confined to a limited range of situations, the manual should remind the reader of the risks involved in generalizing to other types of situations. ESSENTIAL

[Comment: One manual for an aptitude battery presents a great variety of test-criterion correlations. It states that even though the large amount of test-criterion data presented may be confusing to the user, it is nevertheless necessary since "validity is specific" and must always be interpreted for a particular setting in which "the test user himself must evaluate and integrate all of the data available to him."]

C4.3. Since the criterion measure is a sample of possible criterion data, the agreement of that sample with other similar samples that might have been used as measures of the criterion should be reported. If evidence on this question cannot be given, the author should make this clear and should discuss the probable extent of agreement of the sample with other samples as judged from indirect evidence. VERY DESIRABLE

[Comment: When validity is measured by agreement of the test with psychiatric judgment, for example, the degree of agreement among judges should be described. Where a published achievement test is used to obtain the criterion measures, the form-to-form agreement or the reliability reported by the test's author may be used as a basis for evaluating the criterion, due regard being given to the effect of differences between the present sample of persons and the original sample.]

C4.31. If validity coefficients are corrected for errors of measurement *in the criterion*, the computation of the reliability coefficient of the criterion should be explained, and both corrected and uncorrected coefficients should be reported in the manual. ESSENTIAL

[Comment: Coefficients corrected for errors of measurement in the *test* are not estimates of the criterion validity of the existing test and should not be reported. Corrections for attenuation are very much open to misinterpretation, and if misinterpreted give an unjustifiably favorable picture of the validity of the test. The hazard is illustrated in the manual for an adjustment inventory. The author reports correlations between inventory scores and criterion ratings, and also reports the estimated correlations between "true" inventory and criterion scores. He then comments that the augmented correlations "are as high as those often secured between college aptitude tests and college grades." The comparison is improper, since the test author is comparing his augmented coefficients with uncorrected coefficients for ability tests.]

C4.32. For users who are technically oriented, breakdown of test variance into the following sources is appropriate: variance relevant to the criterion, variance explained as form-to-form or trial-to-trial inconsistency, and a reliable-irrelevant remainder. VERY DESIRABLE

[Comment: Such a breakdown is far less subject to misinterpretation than a "corrected" validity coefficient.]

C4.4. The time elapsing between the test administration and the collection of criterion data should be reported in the manual. If the criterion data are collected over a period of time, beginning and ending data should be included. ESSENTIAL

C4.41. If a test is recommended for long-term predictions, but comparisons with concurrent criteria only are pre-

sented, the manual should emphasize that the validity of predictions is undetermined. ESSENTIAL

C4.5. The criterion score should be determined independently of test scores. The manual should describe any precautions taken to avoid contamination of the criterion or should warn the reader of possible contamination. ESSENTIAL

[Comment: When the criterion depends on a judgment, the manual should state whether the test data were available to the rater or were capable of influencing his judgment in any other way. If the test data could have influenced the criterion rating, the user should be warned that the reported validities are likely to be spuriously high.]

C4.6. When the validity of a test is appraised by its agreement with psychiatric diagnoses, the diagnostic terms or categories should be defined specifically and clearly described. VERY DESIRABLE

[Comment: For example, "paranoid schizophrenia, chronic" is preferable as a category to "schizophrenia." Since the types of patients included in specific diagnostic classifications depend to some extent on the point of view of the classifying psychiatrist, an amplified description of each diagnostic category used in the validity study should be presented.]

C4.61. When the validity of a test is appraised by its agreement with psychiatric judgment, the training, experience, and professional status of the psychologist(s) or psychiatrist(s) should be stated, and the nature and extent of his contacts with the patients should be reported. VERY DESIRABLE

C4.7. When the validity of a test for predicting occupational performance is reported, the manual should describe the duties of the workers as well as give their job titles. VERY DESIRABLE (See Comment C5.2.)

C4.71. Where a wide range of duties is subsumed under a given occupational label, the test user should be warned against assuming that only one pattern of interests or abilities is compatible with the occupation. VERY DESIRABLE

[Comment: The manual for one interest inventory rightly points out that, "for any given interest pattern, or combination of patterns, there are jobs at many levels for individuals with a wide range of abilities."]

C4.72. The amount and kind of any schooling or job training received by the subjects between the time of testing and the time of criterion collection should be stated. VERY DESIRABLE

C4.8. When the validity of a test for predicting grades in a course is reported, the reader of the manual should be given a reasonably clear understanding regarding the types of performance required in the course, the nature of instructional method, and the way in which performance is measured. If the test was administered after the course was started, this fact should be specified. ESSENTIAL

C4.9. Local collection of evidence on criterion-related validity is frequently more useful than published data. In such cases the manual should suggest appropriate emphasis on local validity studies, giving advice on how to conduct the studies and how to set up usable expectancy tables or other means for interpreting the results of the studies. VERY DESIRABLE

[Comment: In cases where criteria differ from one locality to another or from one institution to another, no published validity data can serve all localities. For example, the validity of a certain test for predicting grades at a college with a unique kind of curriculum may be quite different from the published validity of the same test that was based on more conventional colleges.]

Criterion-Related Validity Sample

C5. The sample employed in a validity study and the conditions under which

testing is done should be consistent with the recommendations made in the manual. They should be described sufficiently for the user to judge whether the reported validity is pertinent to his situation. ESSENTIAL

[Comment: In his effort to provide adequate data on the sample and on the testing conditions, the publisher is often faced with a dilemma. Too much detailed information in a manual may reduce its effectiveness; yet insufficient data do not allow for proper judgments by the competent user. One aptitude test publisher meets this problem by reporting only major findings, indicating that "detailed data are available from the American Documentation Institute."]

C5.1. Basic statistics that should be reported in the manual for the validation sample are measures of central tendency and variability. ESSENTIAL

C5.11. If the test scores that are analyzed have a distribution markedly different from the distribution of the group with whom the test is ordinarily to be used, correlations or other measures of discrimination in the group to whom the test is likely to be given should be estimated. In reporting such estimates, the manual should cite the original coefficient, the distribution characteristics used in making the new estimate, and the statistical procedure. ESSENTIAL

[Comment: An estimate larger than the observed validity coefficient may be needed when the observed coefficient is based on a group of employees or students who have been selected in such a way as to restrict the range of scores on the test. On the other hand, an estimate lower than the observed coefficient will be appropriate for the biserial correlation between a scholastic aptitude test and college success, where the persons distinguished are dropouts (lower end of the continuum) and honor students (upper end of the continuum). As the test will normally be applied to the whole group of entering students, the validity coefficient should reflect the somewhat lower predictive power of the test in that group.]

C5.2. The validity sample should be described in the manual in terms of those variables known to be related to the quality tested, such as age, sex, socioeconomic status, and level of education. Any selective factor determining the composition of the sample should be indicated. ESSENTIAL

[Comment: If a validity study uses patients as subjects, the diagnoses of the patients would usually be important to report. The severity of the diagnosed condition should be stated when feasible. For tests used in industry the occupation and experience of the workers should be described. For educational tests the nature of the community and any selection policy of the school should be reported.]

C5.3. If the validity sample is made up of records accumulated haphazardly or voluntarily submitted by test users, this fact should be stated in the manual, and the test user should be warned that the group is not a systematic or random sample of any specifiable population. Probable selective factors and their presumed influence on test variables should be stated. ESSENTIAL

[Comment: While it is entirely appropriate to include in the manual such phrases as "the author and publisher of this test would welcome additional data derived from its use," it is extremely difficult to judge adequately the quality and representativeness of most of the resulting reports.]

C5.4. The validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice. Any deviation from this requirement should be described in the manual. ESSENTIAL

[Comment: The validity of tests intended for guidance should generally be determined on subjects tested prior to or

near the time when they are making educational or vocational choices.

One interest inventory was standardized at first on men currently employed in the occupation in question. The ability of these scales to differentiate between occupational groups did not, in and of itself, warrant using the inventory in the counseling of high school or college students. Better evidence was obtained later by administering the inventory to students, determining the nature of their later employment, and then establishing the relation between preoccupational score and later occupation.

If an interest inventory uses a criterion of enrollment or nonenrollment in a certain occupation, the sample used in its validation should include only the range of mental ability appropriate to the occupational group. For example, college students are not suitable subjects with which to estimate the validity of a scale of interest in manual skills, even though some of them later enter manual occupations.]

C5.41. If an ability test is to be used for educational or occupational selection, its validity should be established using subjects who are actual candidates and who are therefore motivated to perform well. If the subjects used in a validity study did not believe that their test scores would be used in making decisions about them, this fact should be made clear. VERY DESIRABLE

C5.5. If the validity of the test is likely to be different for subsamples that can be identified when the test is given, the manual should report the results for each subsample separately or should report that no differences were found. VERY DESIRABLE

[Comment: It is often useful to perform validity studies separately on samples differing in one or more of the common demographic variables. Since subsamples are likely to differ in range, statistical corrections may be necessary to make the results comparable. In such cases a regression equation may be more informative than a correlation coefficient.]

C5.6. In collecting data for a validity study, the person who administers, scores, or interprets the test should have only that information about the examinees that is ordinarily expected to be available in practical use of the test. If there is any possible contamination associated with prior favorable or unfavorable knowledge about the examinees, the manual should discuss its effect on the outcome of the study. ESSENTIAL

[Comment: Whenever knowledge about the examinee may influence test administration or scoring, as it might in the case of individual intelligence tests or projective techniques, the test administrator should not possess knowledge about the examinees that might bias his interpretation of the examinee's responses. Knowing that an examinee is regarded as maladjusted but able may make the person administering an individual test more prone to explore borderline answers or to encourage the examinee when he encounters difficulty. Data collected under such circumstances do not provide an adequate basis for judging the validity of the test by itself.]

Criterion-Related Validity Analysis

C6. Any statistical analysis of criterion-related validity should be reported in the manual in a form from which the reader can determine what confidence is to be placed in judgments or predictions regarding the individual. ESSENTIAL

C6.1. Statistical procedures that are well known and readily interpreted should be preferred in the manual for reporting validity. Any uncommon statistical techniques should be explained, and references to descriptions of them should be given. ESSENTIAL

[Comment: Publishers need not adhere to the commonly used procedures for reporting validity data, but there should be sufficient standard terminology and procedures to allow for adequate judgment by reasonably competent users. One

recently developed ability test manual introduces "circular" profiles, "range" and "stability" scores, and other novel statistical procedures so inadequately explained as to give an aura of the bizarre to the entire manual.]

C6.11. A report in the manual or elsewhere concerning the criterion-related validity of tests should ordinarily include: (*a*) one or more correlation coefficients of a familiar type, (*b*) descriptions of the efficiency with which the test separates criterion groups, (*c*) expectancy tables, or (*d*) charts that graphically illustrate the relationship between test and criterion. ESSENTIAL

[Comment: Reports of differences between group means by themselves give inadequate information regarding validity. If variance is large, classification may be inaccurate even if means differ significantly. A description indicating amount of misclassification or overlapping should be included. The emphasis should be on descriptive statistics for individuals; a significance test alone is insufficient.

In general, since manuals are directed to readers who have limited statistical knowledge, every effort should be made to communicate validity information clearly. For instance, a certain manual reports no criterion-related validity data collected over a period of time; yet the case studies presented suggest a degree of validity totally unsupported by the data in the manual.]

C6.12. If a test is suggested for the differential diagnosis of patients, the manual should include evidence of the test's ability to place individuals in diagnostic groups rather than merely to separate diagnosed abnormal cases from the normal population. ESSENTIAL

[Comment: When a test is recommended for the purpose of assigning patients to discrete categories, such statistics as contingency coefficients, phi coefficients, or discriminant functions should be supplemented by a table of misclassification rates giving, for example, the proportion of patients falsely included in a category or falsely excluded from it. Such proportions should be compared with base rates, i.e., the proportions of correct classifications made possible by a mere knowledge of the sizes of the categories.]

C6.2. An overall validity coefficient should be supplemented with a report regarding the regression slope and intercept and the standard error of estimate at different points along the score range. VERY DESIRABLE

[Comment: The required information could be presented in an expectancy table showing the range of possible criterion values for each of several points on the score range.

For a dichotomous criterion, this objective might be achieved by indicating the proportion of hits, misses, and false inclusions at various cutting scores. One reading readiness test, for instance, reports the percentage of failure in primary reading expected among pupils at each level of test score.]

C6.3. When information other than the test scores is known to have an appreciable degree of criterion-related validity and is ordinarily available to the prospective test user, the manual should report the validity of the other information and the resulting multiple correlation when the new test information is combined with it. ESSENTIAL

[Comment: Whether a test should be used for prediction and classification when other information is readily available depends not on the validity of the test but on its "incremental validity," i.e., what it adds to the soundness of the judgment that would otherwise be made.

For a test recommended as a predictor of school achievement, the manual should report how much the test enhances prediction based on the subjects' previous school records. A test is not likely to improve greatly the prediction of college grades when it is highly correlated with past high school grades. Such a test may

be used in dealing with pupils coming from scattered high schools, the past records of which are not available or not on a comparable scale, or it may be used to correct statistically the records for different schools to make them comparable.

For a questionnaire intended to predict marital success, delinquency, and similar behavioral variables, the manual should report how much the questionnaire enhances prediction over that provided by base rates developed from demographic variables such as socioeconomic status.]

C6.31. If the validity of a test is demonstrated by comparing groups that differ on the criterion, the manual should report whether and by how much the groups differ on other available variables that are relevant. VERY DESIRABLE

[Comment: Since groups which differ on a criterion may also differ in other respects, the test may be discriminating on a quality other than that intended. Types of mental disorder, for instance, are associated with age, education, and length of time in hospital. Confounding of this sort should be taken into account when appraising the usefulness of the test for diagnosis.]

C6.4. When a scoring key or the selection of items is based on a tryout sample, the manual should report validity coefficients based on one or more separate cross-validation samples, rather than on the tryout sample or on a larger group of which the tryout sample is a part. ESSENTIAL

C6.5. If the manual recommends certain regression weights for combining scores on the test or for combining the test with other variables, the validity of the composite should be based on a cross-validation sample. VERY DESIRABLE

[Comment: Cross-validation is particularly necessary when the number of predictors entering the study (not the final equation) is greater than four or five and when the sample size is less than 200.]

C6.6. Whenever it is proposed that decisions be based on a complex nonlinear combination of scores, it should be shown that this combination has greater validity than some simpler linear combination. VERY DESIRABLE

[Comment: The use of "moderator variables," for example, is to be recommended only where this produces a clear improvement in validity in a cross-validation sample. Also, when it is proposed that some pattern of scores, for example, high standing in scores on both Variables 2 and 5, is an indicator of success, it is necessary to show that the proportion of successful persons in the group so identified is higher than would be expected from the regression of frequency of success on a linear combination of Scores 2 and 5.]

C6.7. To ensure the continued correct interpretation of scores, the validity of the suggested interpretations should be rechecked periodically and the results reported in subsequent editions of the manual. VERY DESIRABLE

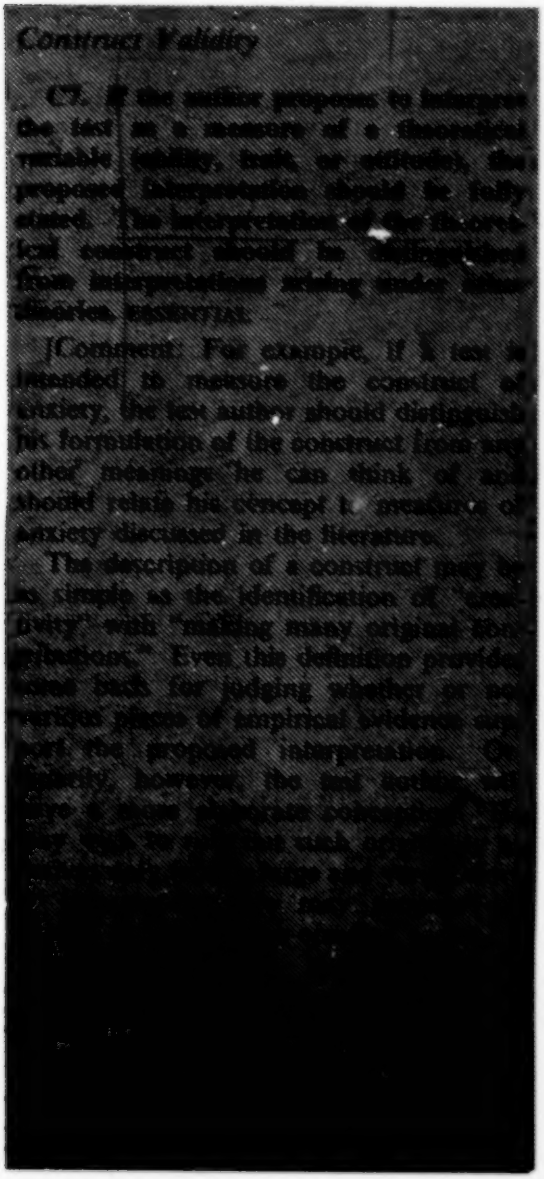
[Comment: Job requirements, conditions of work, and the types of person entering an occupation often change materially with the passage of time. Similarly the meanings of clinical categories, the nature of therapeutic treatment, and the objectives in any school course change. So also will the difficulty and psychological meaning of test items. Hence, the reader should be in a position to judge the extent to which scales are obsolete.

Criterion data for the psychologist scale of a much used interest test were gathered in 1927. Subsequent research showed that these psychologists were no longer representative of the field. The current manual reports the date (1948) of the validating studies for the revised key. With the growth of mathematical psychology on the one hand, and of private clinical practice on the other, this scale may, in certain aspects, again be obsolescent.]

C6.71. If the validity of a suggested test interpretation has not been checked within 15 or 20 years, the test should be withdrawn from general sale and dis-

tributed, if at all, only to persons who will conduct their own validity studies. DESIRABLE (See A2.)

[Comment: This standard, as worded, is extremely liberal. Removal of tests from the market and repetition of validity studies have not been common practice. The present liberal standard moves only a short way toward the ideal. It is not necessary to repeat every part of the validation; what is needed is a repetition of those studies that are most likely to have been rendered obsolete.]

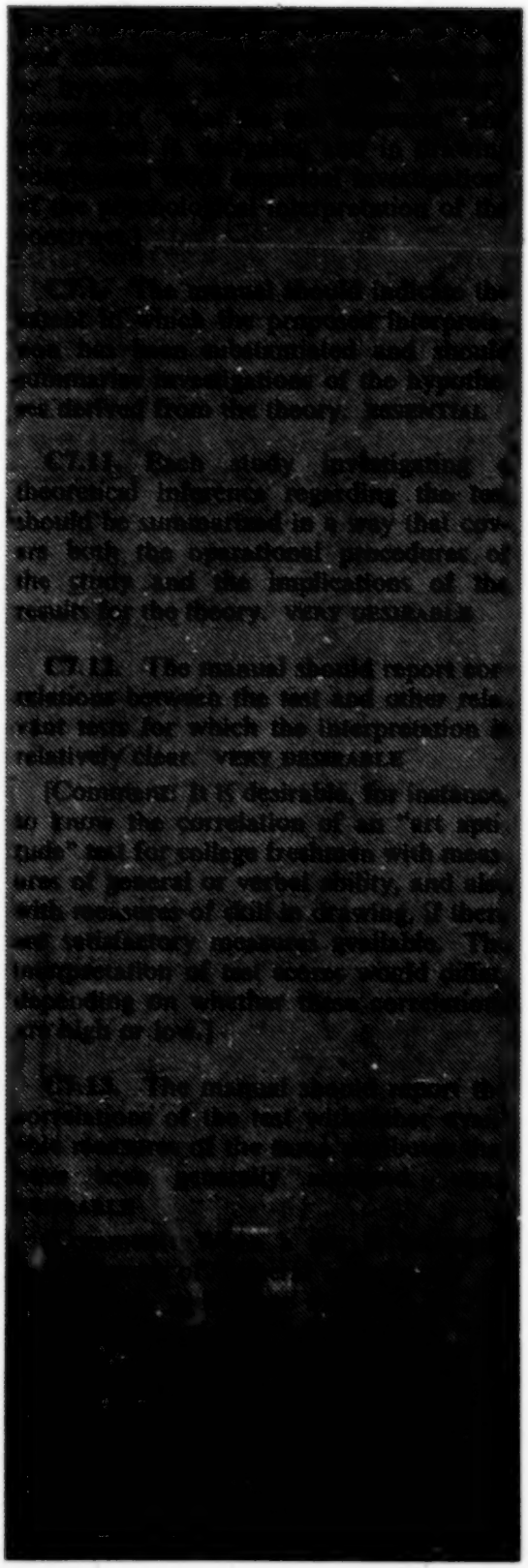


Construct Validity

C7. If the author proposes to interpret the test as a measure of a theoretical variable (ability, trait, or attitude), the proposed interpretation should be fully stated. The interpretation of the theoretical construct should be sufficiently free from interpretations arising under future theories. ESSENTIAL

[Comment: For example, if X (an M intended to measure the construct of anxiety, the test author should distinguish his formulation of the construct from any other meanings he can think of and should relate his concept to measures of anxiety discussed in the literature.

The description of a construct may be as simple as the identification of "creativity" with "making many original associations." Even this definition provides some basis for judging whether or not particular pieces of empirical evidence support the proposed interpretation. On the other hand, the test author may



C7.11. Each study investigating a theoretical inference regarding the test should be summarized in a way that covers both the operational procedures of the study and the implications of the results for the theory. VERY DESIRABLE

C7.12. The manual should report correlations between the test and other relevant tests for which the interpretation is relatively clear. VERY DESIRABLE

[Comment: It is desirable, for instance, to know the correlation of an "art aptitude" test for college freshmen with measures of general or verbal ability, and also with measures of skill in drawing, if there are satisfactory measures available. The interpretation of test scores would differ depending on whether these correlations are high or low.]

C7.13. The manual should report the correlations of the test with [illegible] measures of the same [illegible] DESIRABLE

BEST COPY AVAILABLE

DEFENDANT ALBEMARLE'S EXHIBIT NO. 2

Power Plant

List of Items Submitted

1. Instructions for safe handling of chemicals
2. Nalco Operating Handbook
3. Cochrane Manual, Sections 1-5
4. Water Plant Log Sheet
5. Water Log Sheet
6. Layout of Water Plant and notes of clarifier operation
7. Layout of Power Plant flow systems
8. Combustion Engineering Handbook
9. General Electric Handbook
10. Written operating instructions
11. Turbine Log Sheet
12. Instrument flow diagrams
13. Bailey Meter Company Handbook
14. Set of Power Plant charts
15. Power Plant Log Book
16. Boiler Log Sheet
17. Bark Log Sheet

Wood Yard
Content Evidence:

1. Record by tractor driver placing cars to be unloaded which is given to Foreman at end of shift. (Picture of chain operator's panel).

2. Chip unloader receiving and unloading report.
3. Wood Yard Oiler Lubrication Chart.
4. Small Equipment Operator's Manual for D-8 Bull-dozer.
5. Small Equipment Operator's Lubrication Chart for Michigan Tractor Shovel (Front end loader).
6. Long Log Operator's daily report.
(Picture Long Log Operator's control panel).
7. Operator's Manual—lima, shovel, crane, clam shell, drag-line and pull shovel—Type 802.
8. Crane Operator's Check Report.
9. American Crane Operator's Instruction Manual on control adjustments.

Pulp Mill
Content Evidence:

1. Standard Operating Procedure No. 6 Recv. Boiler—on line procedure when No. 1 Power Boiler is up to pressure.
2. Standard Operating Procedure—Green Liquor Line Wash out.
3. Standard Operating Procedure—Boiler Blow-down Valves.
4. Standard Operating Procedure—No. 6 Recv. Stream Press Control System report from C. Reese.
5. Standard Operating Procedure Recv. Boiler Spray Liquor Solids.
6. Standard Operating Procedure—Green Liquor Test.

7. Standard Operating Procedure—Salt Cake Inventory Control.
8. Memo from Hank: Recv. 1st helper No. 5 Recv. Boiler.
9. Memo from Hank: Recv. 2nd Helper.
10. Screening—Washing Reports: 5-3-71, 5-9-71, 5-12-71, 5-13-71, 3-8-71, 4-22-71, 5-19-71, 5-29-71.
11. Memo from Hank—Caustic Operator and reports.
12. Memo from Hank—Kiln Operator and reports.
13. Recv. operational check sheet.
14. Memo from Hank—qualification of Recv. Operator.
15. No. 5 Recv. Reports.
16. No. 6 Recv. Hot Process Sgtner Raw water label flow.
17. Sgtner Rejuvenation Cycle—Blue Pen—back water flow.
18. No. 3 Water Sgtner chart X10=GPM.
19. No. 2 Water Sgtner chart X10=GPM.
20. No. 4 Water Sgtner chart X10=GPM.
21. No. 1 Water Sgtner chart X10=GPM.
22. No. 5 Recovery—Prec. level and dis. Density Black liq. To solids. Red-Precipitator level—blue-lower cascade density—Green black liquor solids 45-75%.
23. No. 5 Recv. air, gas, temp.
24. No. 5 Rev. Red: Black liq. flow to sprays 0-100,000 lbs.-hr. blue: up take draft 0-10 ins.
25. No. 5 Recv. Primary heater.
26. No. 5 Recv. Diss. tank level.
27. No. 5 Recv. Secondary heater.

28. No. 5 Cascade level.
29. No. 5 Recv. Green liq. Be.
30. B Evaporators—conductivity.
31. B Evaporators—feed liq. tank level.
32. No. 5 Recv. Sweet flow to feed tank.
33. B Evaporators ratio flow.
34. Evaporators Boiling Point first section.
35. No. 6 Recv. conductivity.
36. No. 6 Recv. liquor density.
37. No. 6 Recv. black liq. heater temp.
38. No. 6 Lower cascade level.
39. No. 6 Precipitator wet bottom level.
40. No. 6 Recv. Prec. valve Pos. No. 1, No. 2, No. 3.
41. No. 6 Recv. Oxygen and combustibles.
42. No. 6 Recv. heavy black liquor air flow.
43. Wash water valve position.

Maintenance
Content Evidence:

1. Assorted Training and operational manual for equipment maintenance employees must repair.
2. Assorted blue prints.
3. Outline of the apprenticeship Training Program.

Shipping B Mill
Content Evidence:

Instruction Manual for B Paper Mill Crew.
Assorted Blue Prints.

DEFENDANT ALBEMARLE'S EXHIBIT NO. 3

To: Edward C. Moore, Jr.
Albemarle Paper Company

From: Joseph Tiffin, Ph.D.

Re: Determination of relationships between test scores and rated job performance of employees on ten groups of jobs. All of the employees had been given the Beta Test, the Wonderlic Form A, and the Wonderlic Form B test.

General Summary: *Statistical Analysis*

Significant correlations were obtained for at least one of the three tests investigated for nine of the ten groups of jobs. A summary of these correlations is given in the following table. In this table asterisks are used to indicate the significance level of the correlations. Two asterisks (**) indicate that there is only one chance in 100 that the correlation could have occurred by chance. One asterisk (*) means that there are five chances in 100 that the correlation could have occurred by chance alone.

It is standard practice in the profession not to use tests if an analysis such as the one conducted in this investigation shows that there are more than five chances in 100 that the correlation could have occurred by chance alone.

Keeping this stipulation in mind, it can be seen in the following table that usable results were obtained with one or more of the tests for Job Groups 1, 2, 3, 4, 5, 7, 8, 9, & 10, which is nine of the ten groups of jobs studied. The only job group for which none of the tests was found to be usable was Job Group 6 Stock Room Operator and Stock Room 1st Helper.

Job Group	*N*	*Test Beta*	*W-A*	*W-B*
1. Caustic Operator, Lime Kiln Operator	8	.25	1.00**	.47
2. C. E. Recovery Operator, C. E. Recovery 1st Helpers & Evaporator Operators	12	.64**	.32	.17
3. Wood Yard: Long Log Operators, Log Stackers, Small Equipment Operators & Oilers	14	.00	1.00**	.72*
4. Technical Services: B Mill Shift Testmen, Additive men, General Lab. Testmen, General Lab. asst., A Mill Testmen, Samplemen		.50*	.75**	.64*
5. B Paper Mill: Machine Tenders and Back Tenders	16	.00	.50**	.34
6. B Paper Mill: Stock Room Operator, Stock Room 1st Helper	8	—.50	.00	.00
7. B Paper Mill: 3rd Hands, 4th Hands & 5th Hands	21	.43	.81**	.60**
8. Wood Yard: Chipper Unloader, Chipper Operator, No. 2 Chain Operator	6	.76*	—.25	1.00**
9. Pulp Mill: Stock Room Operator, Stock Room 1st Helpers	8	.50	.80*	.76*
10. Power Plant: Power Plant Operator, Power Plant 1st Helper, Power Plant 2nd Helper	12	.34	.75**	.66*

Graphic Analysis

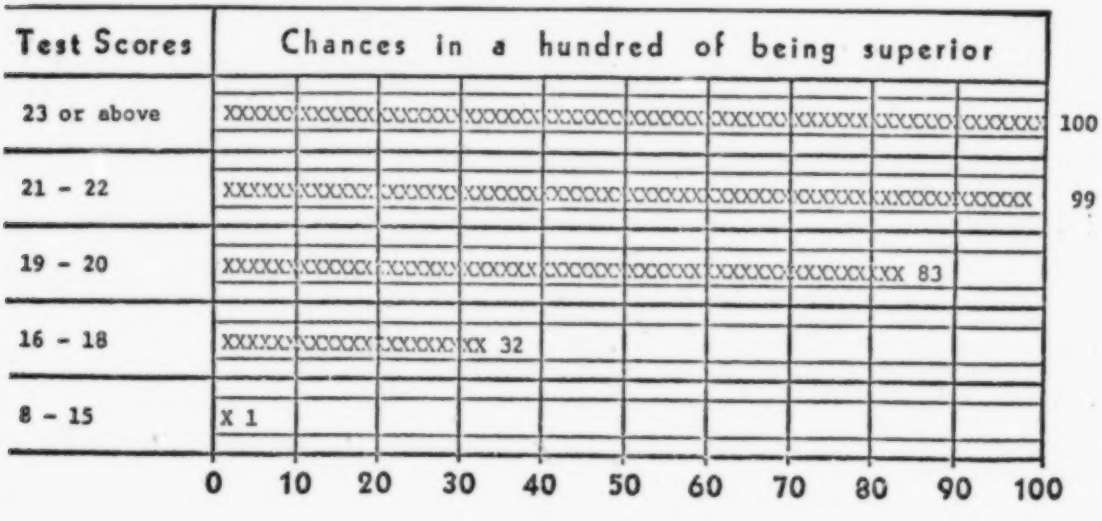
The EEOC Guidelines (as given in the Federal Register on April 21, 1971) state "the presentation of the results of

a validation study must include statistical and, where appropriate, graphic representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior."

To fulfill the graphic representation requirement of the EEOC Guidelines I have prepared and am showing in the figures which follow, expectancy charts for the studies in which the tests can safely be used for hiring and/or promotion.

Job Group No. 1

Jobs: Caustic Operator, Lime Kiln Operator
Test: Wonderlic A
Standard of Job Success: Rated in the best 63% of present employees
Number in the sample: 8 men



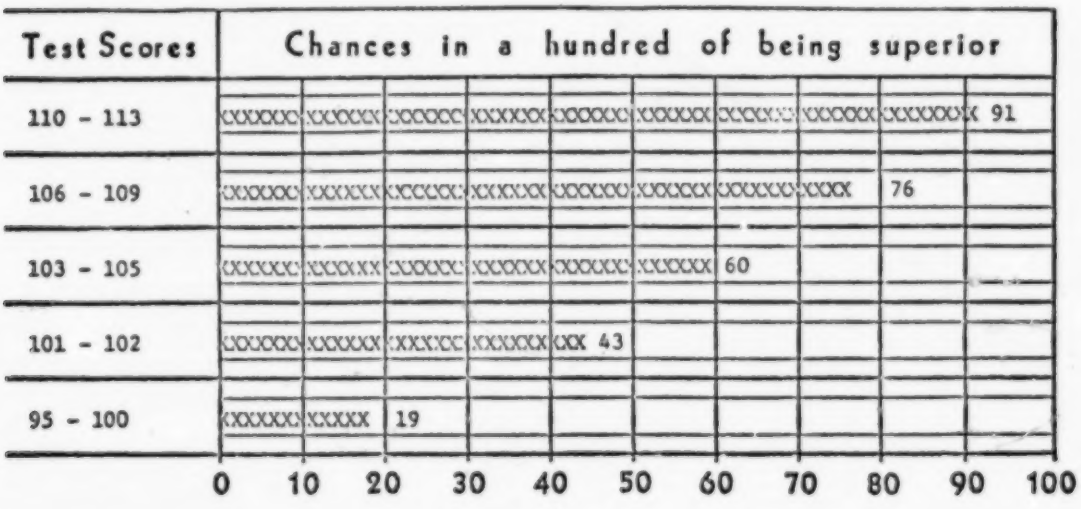
Job Group No. 2

Jobs: C. E. Recovery Operator, C. E. Recovery 1st Helpers and Evaporator Operators

Test: Beta

Standard of Job Success: Rated in the best 58% of present employees

Number in sample: 12 men



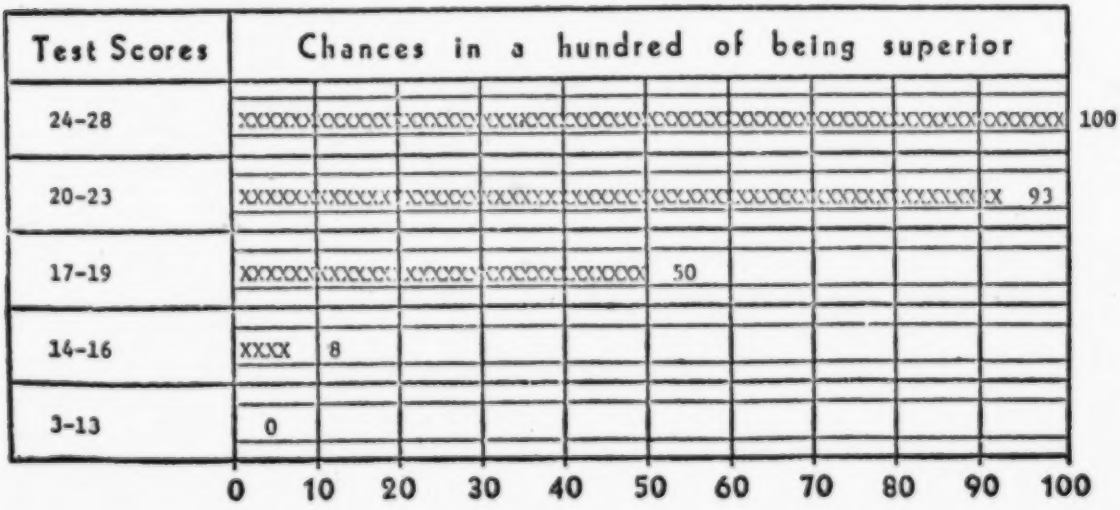
Job Group No. 3

Jobs: Wood Yard: Long Log Operator, Log Stackers, Small Equipment Operators, and Oilers

Test: Wonderlic A

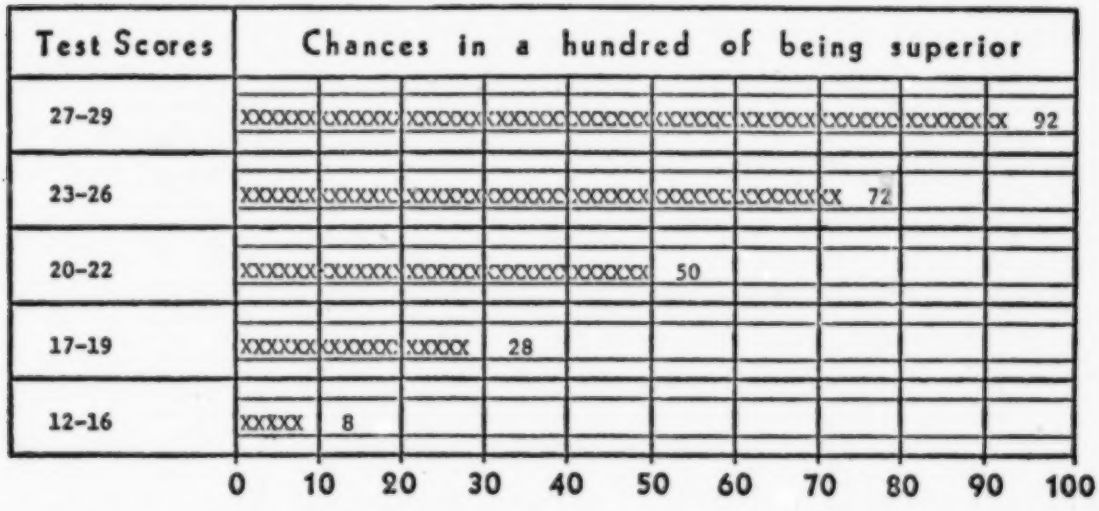
Standard of Job Success: Rated in the best 50% of present employees

Number in Sample: 14 men



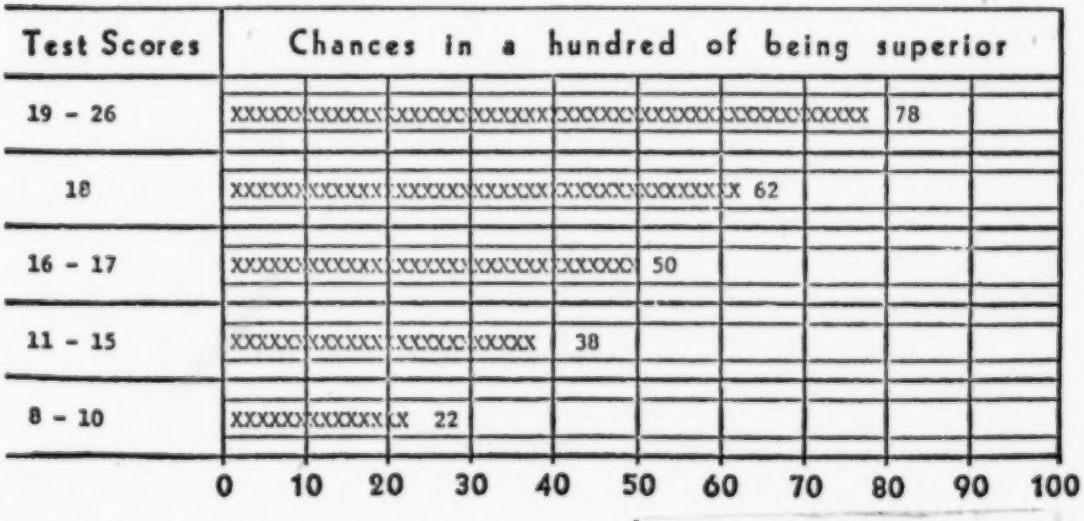
Job Group No. 4

Jobs: B Mill Shift Testmen, Additive Men, Gen. Lab. Testmen, Gen. Lab. Asst., A Mill Testmen, Samplemen
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in Sample: 16 men



Job Group No. 5

Jobs: B Paper Mill, Machine Tenders and Back Tenders
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in the sample: 16 men



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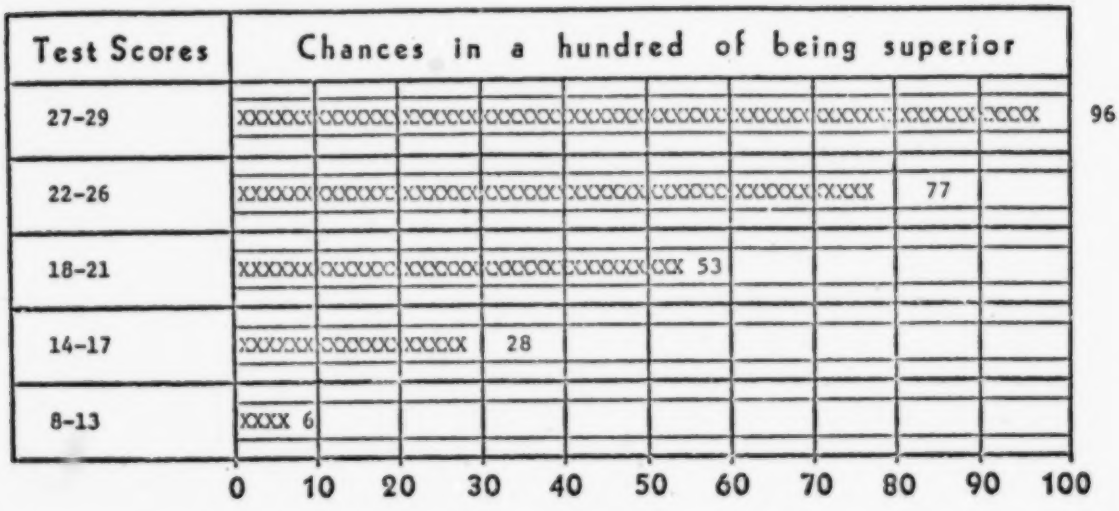
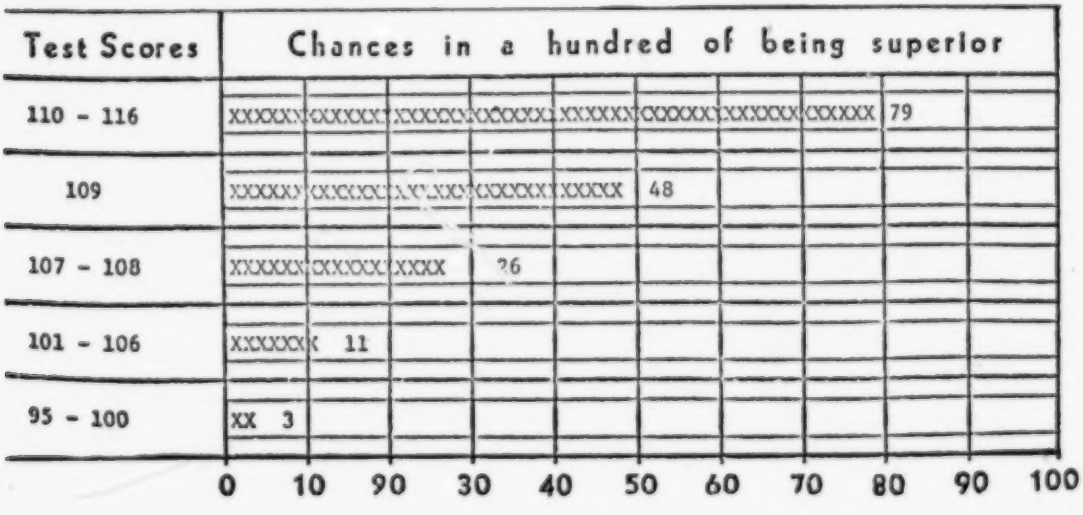
Job Group No. 7

Jobs: B Mill: 4th Hands and 5th Hands
Test: Wonderlic A
Standard of Job Success: Rated in the best 52% of present employees
Number in Sample: 21 men



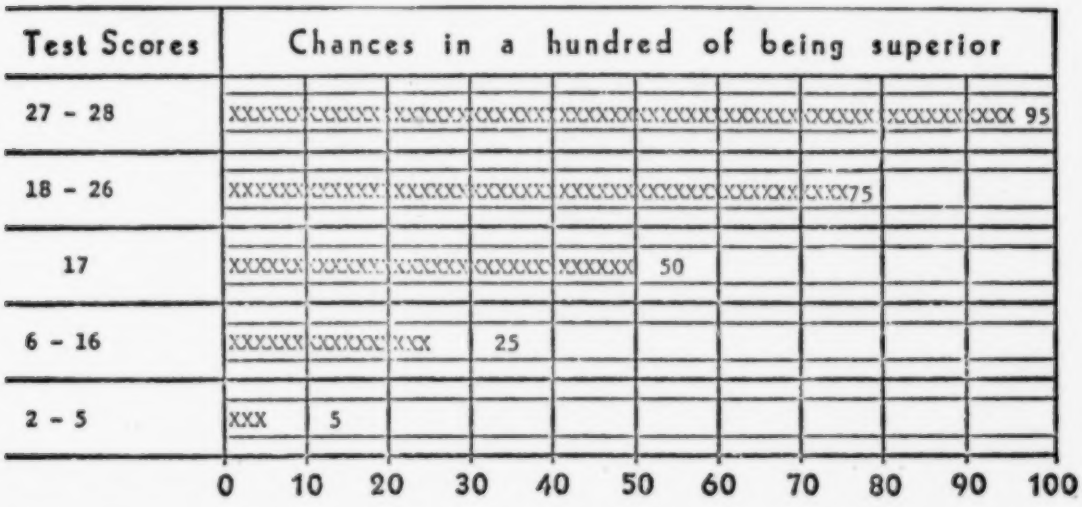
Job Group No. 8

Jobs: Wood Yard: Chipper Unloader, Chipper Operator, No. 2 Chain Operator
Test: Beta
Standard of Job Success: Rated in the best ⅓ of present employees
Number in sample: 6 men



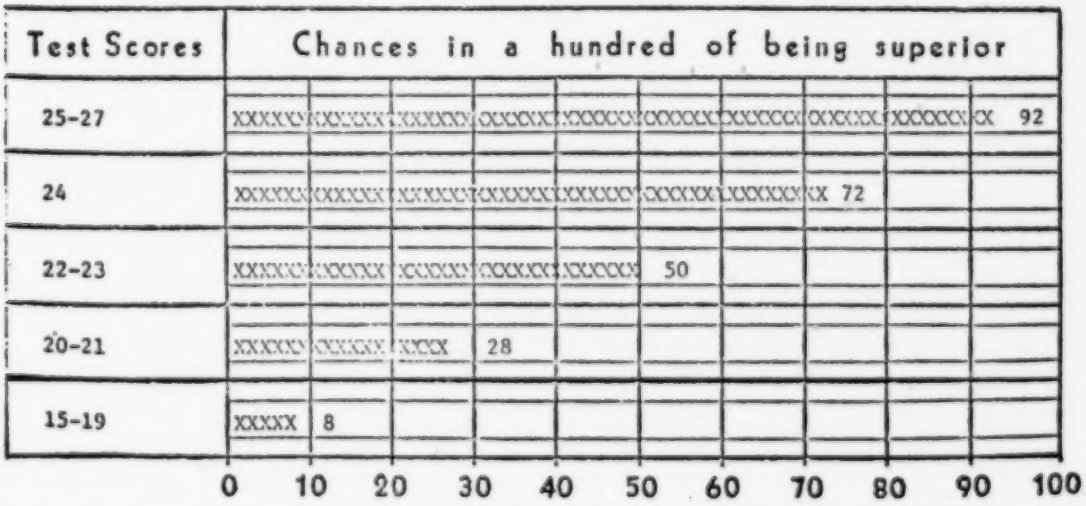
Job Group No. 9

Jobs: Pulp Mill, Stock Room Operator, Stock Room 1st Helpers
Test: Wonderlic A
Standard of Job Success: Rated in the best 57% of present employees
Number in sample: 7 men



Job Group No. 10

Jobs: Power Plant Operators, P. P. 1st Helpers, P. P. 2nd Helpers
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in sample: 12 men



General Summary:

Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line. The EEOC could not reasonably object to these standards in the light the validation data covered in this report.

/s/ Joseph Tiffin, PhD

DEFENDANT ALBEMARLE'S EXHIBIT NO. 22

VITA

Joseph Tiffin

July, 1971

Date of Birth: July 4, 1905

Marital Status: Married
Children: One daughter, Mrs. Catherine (Tiffin) Kestle

Education:

B.A., University of South Dakota, 1927
M.A., University of Iowa, 1928
Ph.D., University of Iowa, 1930

Present Position:

Professor of Industrial Psychology, Purdue University. Have been on the Staff at Purdue University since Feb. 1938.

Previous Positions:

National Research Council Fellow, 1930-1931
Staff, University of Iowa, 1931-1937
Staff, Brooklyn College, 1937-1938
Vice Chairman, 6th Regional War Labor Board, Feb. 1 to Mar. 1, 1943

Awards, Affiliations, and Attainments:

Diplomate in Industrial Psychology, American Board of Examiners in Professional Psychology
Member of American Psychological Association, Midwestern Psychological Association, Indiana Psychological Association, Phi Beta Kappa, and Sigma Xi

Past President, Division of Industrial Psychology, American Psychological Association

Honorary Doctor of Optical Science Degree from the Northern Illinois College of Optometry, 1954

Recipient of the Gordon A. Barrows Memorial Award for Distinguished Contribution to Psychology. This Award was made by the Indiana Psychological Association in 1966.

Listed in Who's Who in America and American Men Of Science.

Consulting Activities:

1. Bausch and Lomb Optical Company; 1939 to 1953. During this period, I worked closely with the company in developing the Orthorater, an instrument for use in industry to measure the visual skills of applicants and employees.
2. M & M's Candies, 1957 to 1959. During this period, I developed methods of evaluating consumer reaction to retail packages.
3. Acme Steel Co., 1957 to 1959. Developed a new method of evaluating job performance of factory personnel.
4. Conducted attitude and/or employee morale surveys for the following companies:
   a. Victor Adding Machine Company, Chicago, Illinois
   b. Union Special Machine Company, Chicago, Illinois
   c. International Register Company, Chicago, Illinois
   d. Block's Department Store, Indianapolis, Indiana
   e. National Lead of Ohio, Cincinnati, Ohio
5. Consultant of the A. C. Nielsen Co. 1962 to 1968.

Have developed and administered a battery of personnel tests to identify fieldmen who can be promoted into positions in which they deal directly with Nielsen clients.

6. Consultant of the American Paper Institute, 1965 to present. Analyze the use of personnel tests being made by the member companies of this association.

7. Organized, with Dr. C. H. Lawshe, the Personnel Testing Institute for Business and Industry. During the past 22 years, this Institute has been attended by over 750 personnel men and women from a wide variety of companies.

8. Consultant to Arvin Industries, Inc. Evaluation of candidates for set-up man and trades apprenticeships 1968 to present.

Publications:

Publications from Purdue University

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Technical Information in Machine Shop (Purdue University, 1940).

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16. Joseph Tiffin, Manual of Directions: Purdue Vocational Achievement Tests, (Purdue University, 1940).

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21. Edwin Ewart, S. E. Seashore, and Joseph Tiffin, A Factor Analysis of an Industrial Merit Rating Scale, *Journal of Applied Psychology,* Vol. XXV, No. 5, 1941, 481-486.

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24. Joseph Tiffin, Industrial Psychology, (Prentice-Hall, Inc., 1942), pp. XVI-386.

25. Joseph Tiffin and Wayne Musser, Weighting Merit Rating Items, *Journal of Applied Psychology* (XXVI) (1942), pp. 575-583.

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Publications before coming to Purdue University:

1. Joseph Tiffin, An Experimental Study of Variations in Breath Pressure in the Vocal Vibrato. *Proc. Iowa Academy of Science,* 1928, *35,* 297-298.

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DEFENDANT ALBEMARLE'S EXHIBIT NO. 24

REVISED BETA EXAMINATION

PREPARED *by* C. E. KELLOGG, Ph. D.,
Associate Professor of Psychology, McGill University.

ASSISTED *by* N. W. MORTON, Ph. D.,
Lecturer in Psychology, McGill University.

	Raw Score	Weighted Score
Test 1		
Test 2		
Test 3		
Test 4		
Test 5		
Test 6		
Total		
Rating		

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Write your name here.....

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Age..... Sex.....

Address.....

Place of Birth.....

How many years have you lived in this country?.....

Last grade reached in school.....

Present position.....

Last position.....

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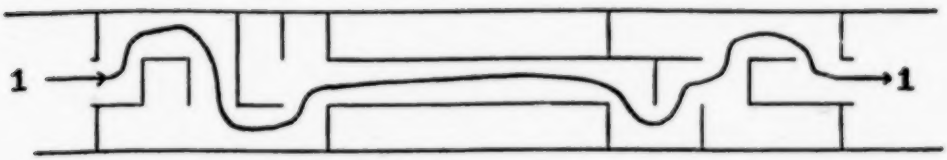
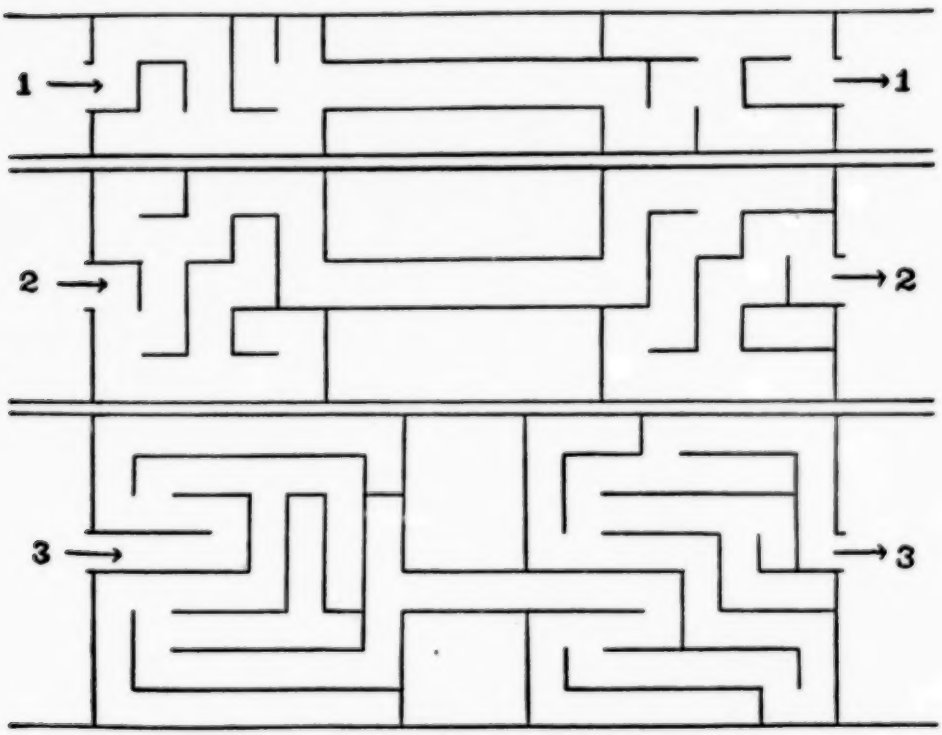
EXERCISE 1

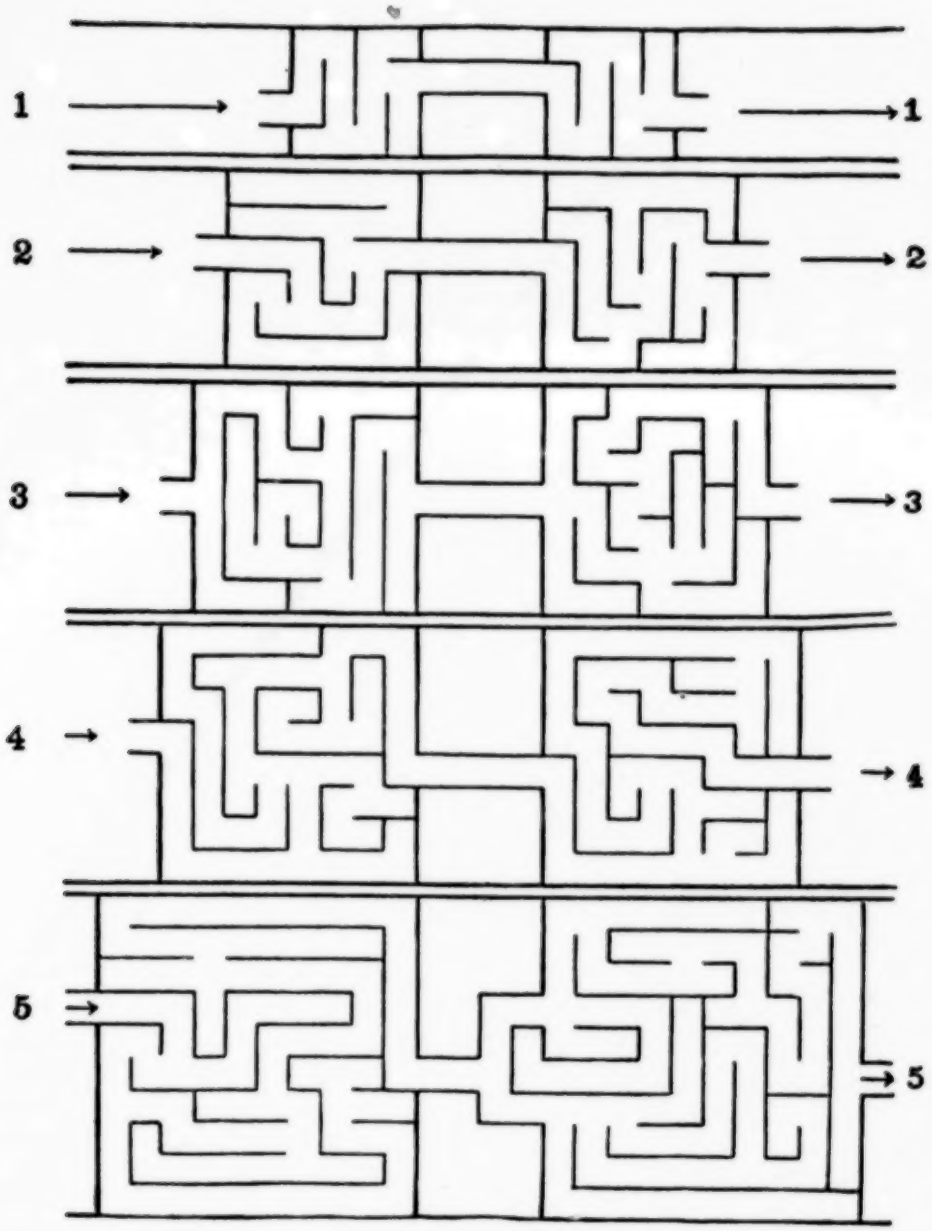


Mark the shortest path from each arrow at the left to the opposite arrow at the right, but do not cross any of the lines



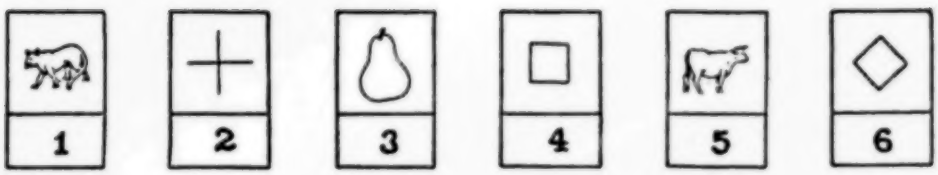
TEST 1

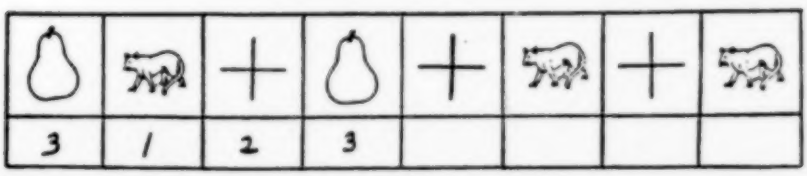
Mark the shortest path from each arrow at the left to the opposite arrow at the right, but do not cross any of the lines

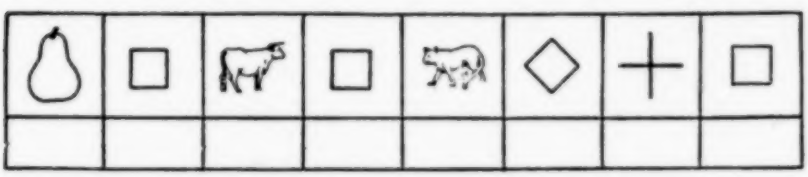


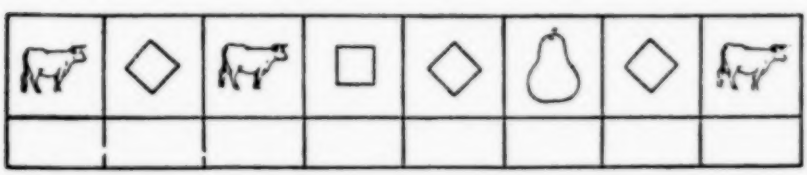
EXERCISE 2

Put the right number under every drawing



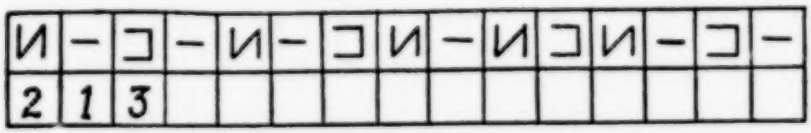


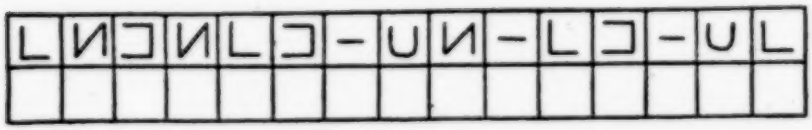


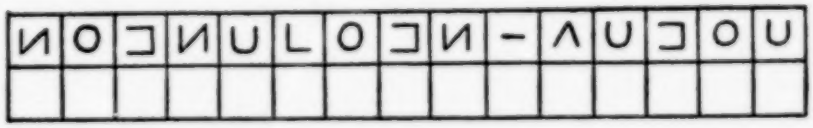


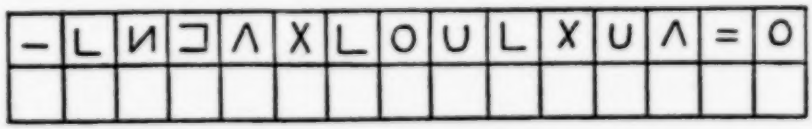
TEST 2

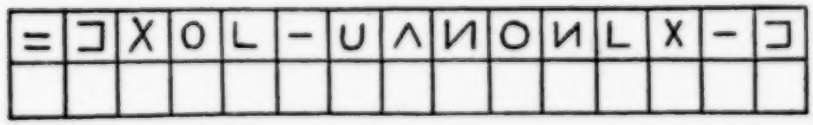
Put the right number under every mark

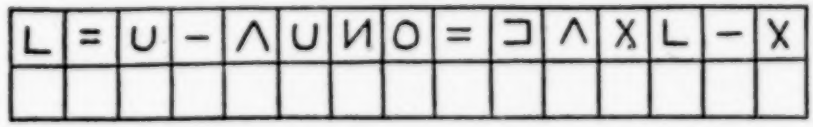




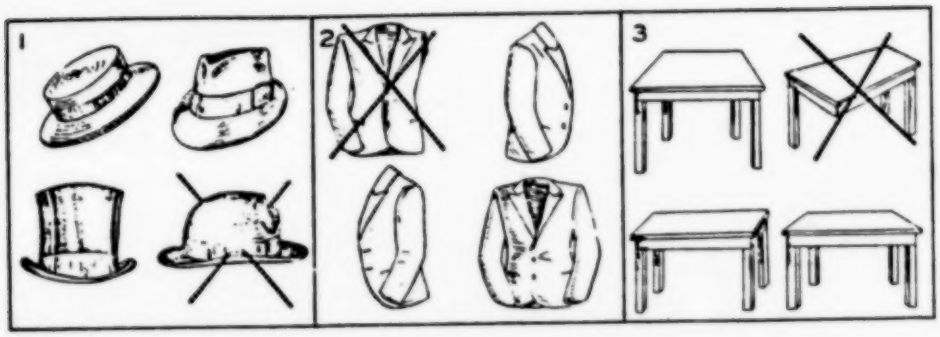




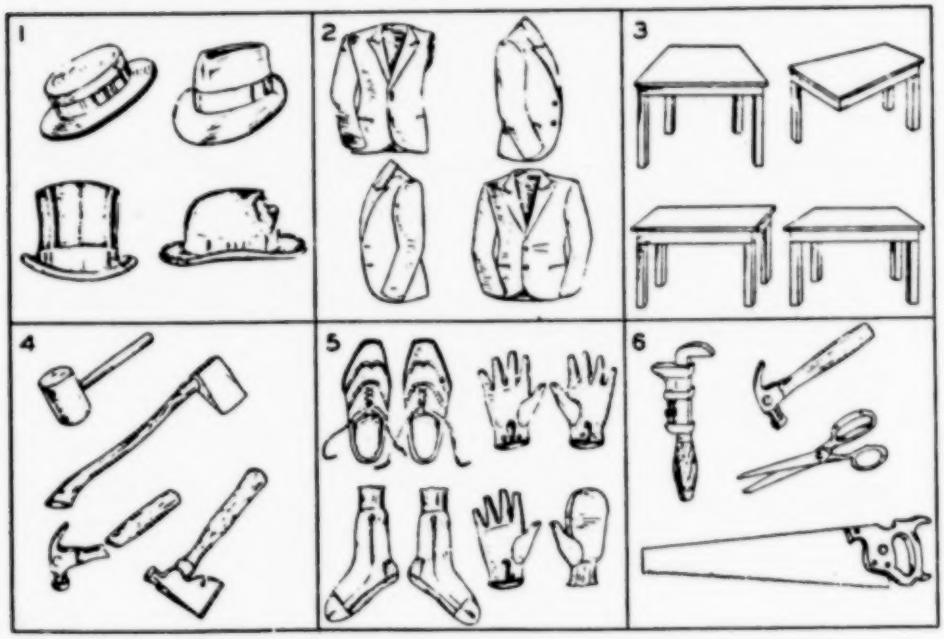




EXERCISE 3



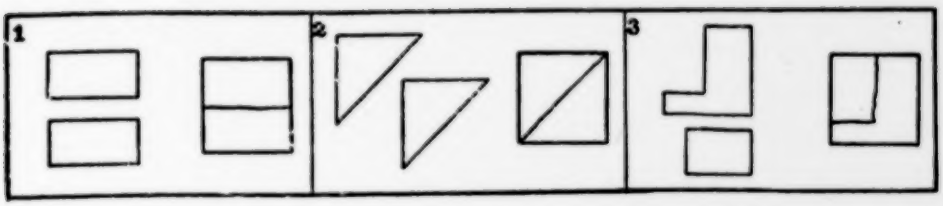
In each square mark the thing that is wrong



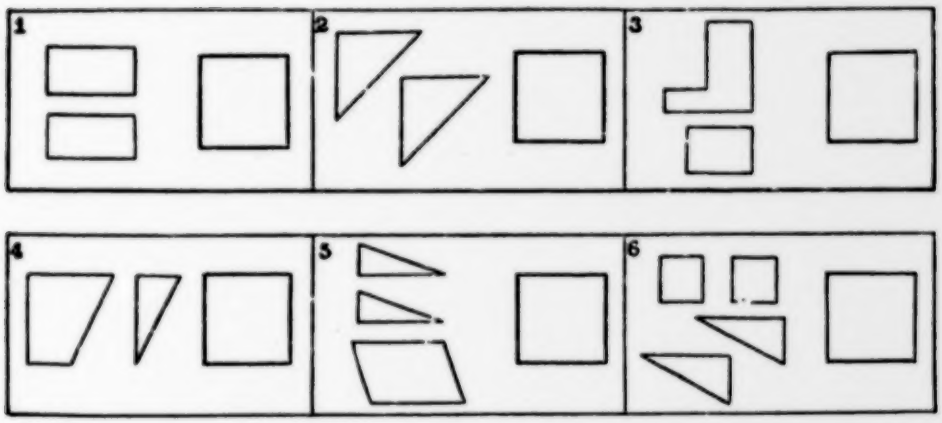
TEST 3

In each square mark the thing that is wrong

EXERCISE 4

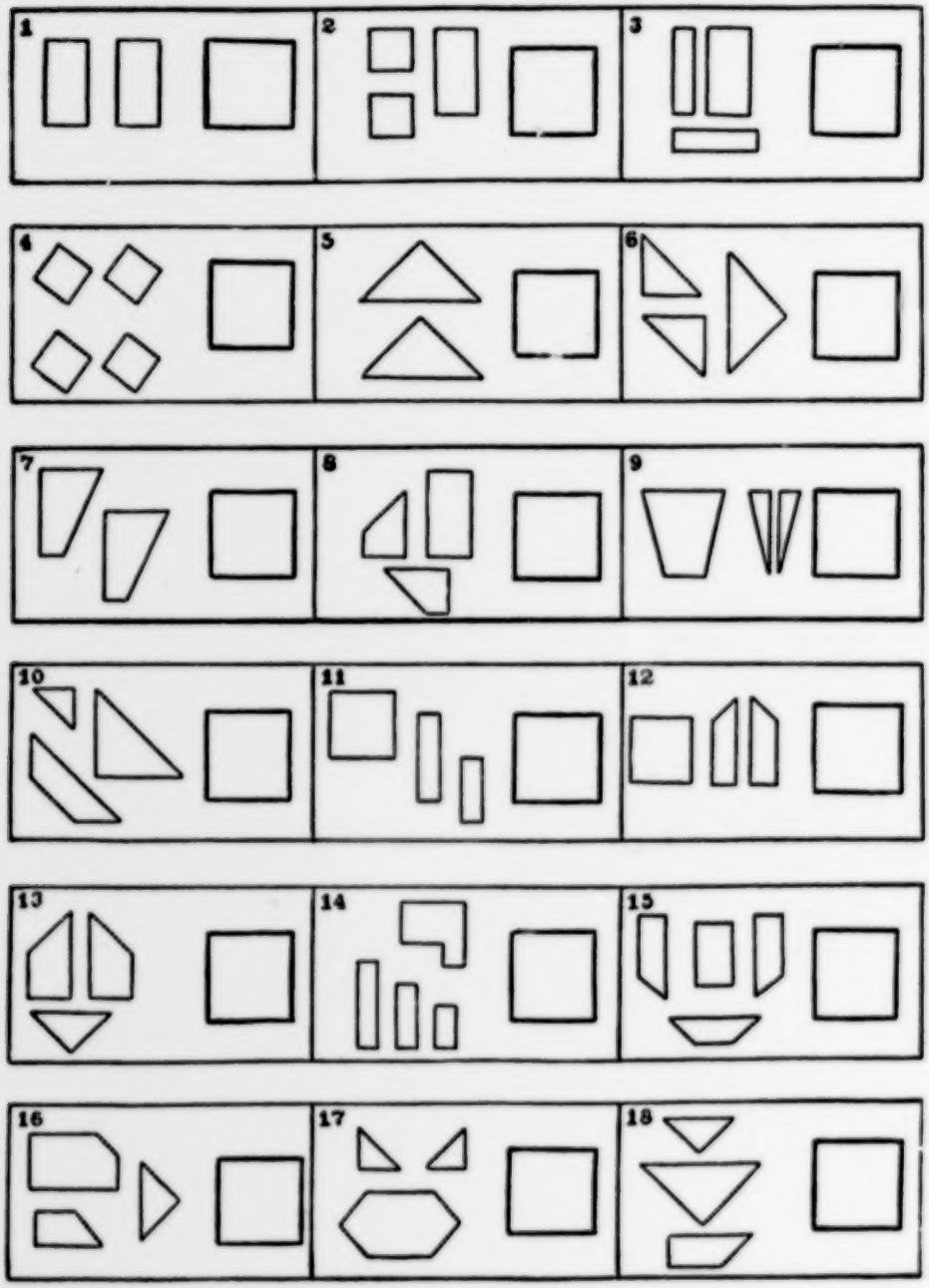


Mark each square to show how the pieces at its left will fit into it

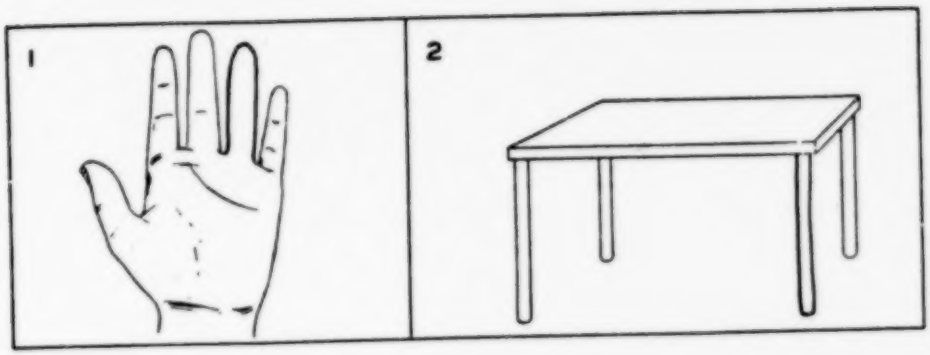


TEST 4

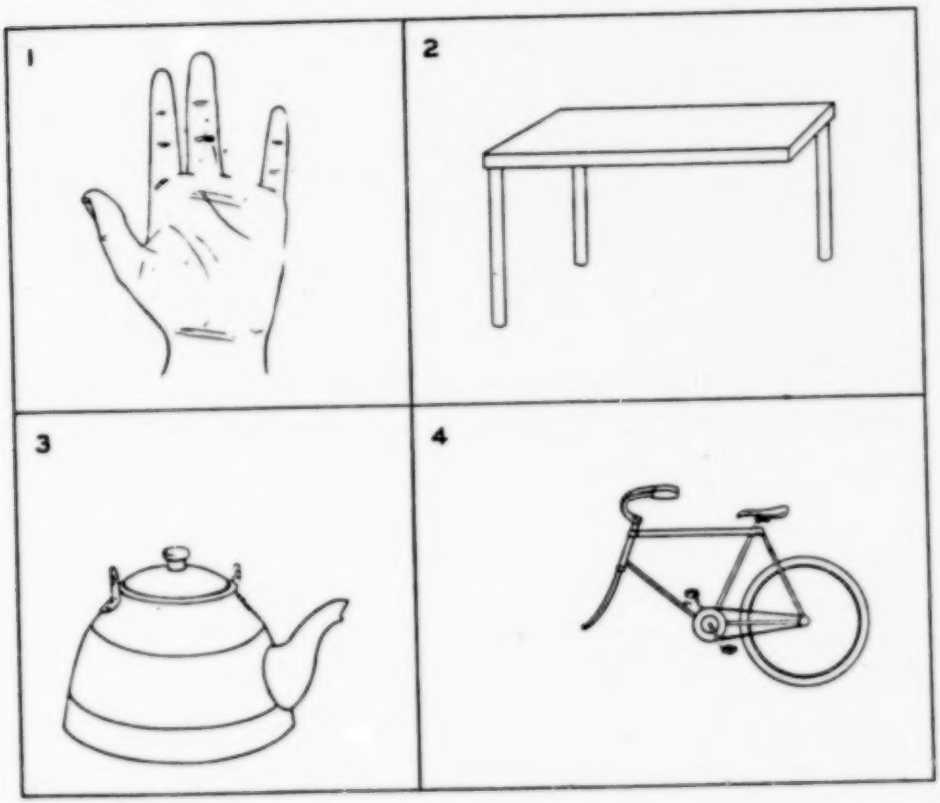
Mark each square to show how the pieces at its left will fit into it



EXERCISE 5

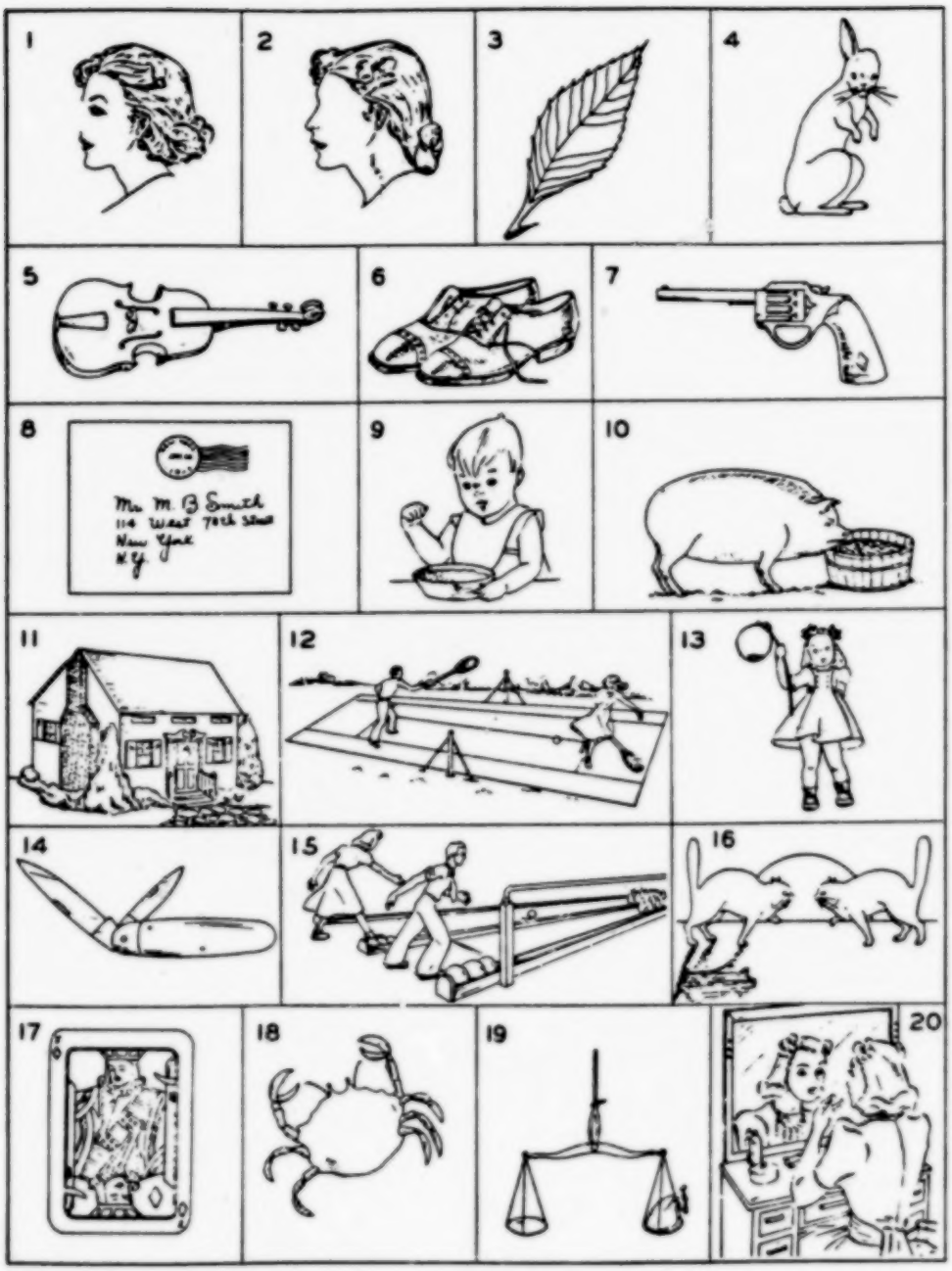


In each picture draw what is left out. Work fast



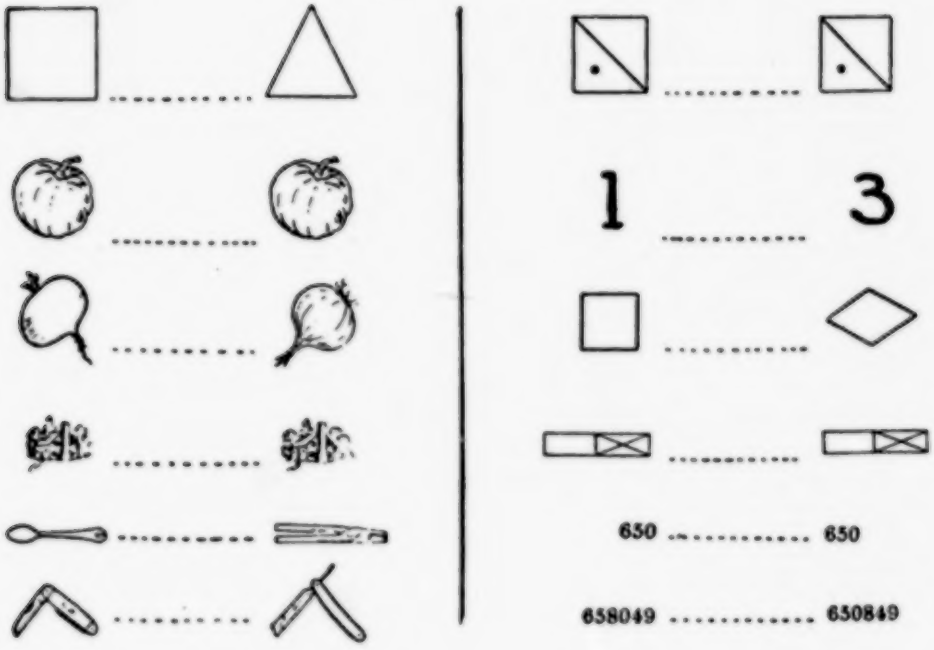
TEST 5

In each picture draw what is left out. Work fast



EXERCISE 6

Look at each pair of drawings or numbers, and make a mark on the dotted line if they are not alike



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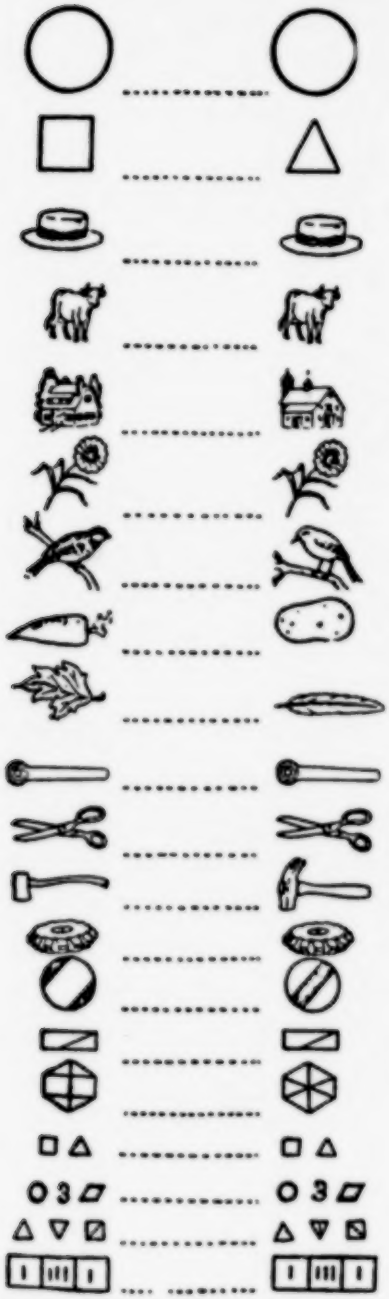

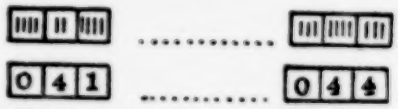

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DEFENDANT HALIFAX LOCAL NO. 425's
EXHIBIT NO. 2

Letter from K. D. Running to David L. Mills
Dated September 23, 1968

Albemarle Paper Company
Roanoke Rapids Division
Roanoke Rapids, North Carolina 27870

September 23, 1968

Mr. David L. Mills
President, Local No. 425
United Papermakers and Paperworkers
Roanoke Rapids, North Carolina 27870

Dear Mr. Mills:

You and the Union Committee have requested that the Company write you concerning what we have done and are continuing to do to provide more work for long-service employees who are on the extra board. You brought to our attention a few months ago that some of these employees were not getting much work. Since that time, we have taken a number of steps which have resulted in these employees getting more work. We plan to continue to do the things that we have already done to provide them with more work and seek out other ways of favoring these employees with the available work. I think you will agree that both the Company and the Union are very much concerned that these long-service employees receive as much work as can reasonably be provided in line with their qualifications.

Sincerely yours,

K. D. Running
Vice President

KDR/j

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

Civil No. 989

Joseph P. Moody, et al.,

Plaintiffs,

v.

Albemarle Paper Company, A Virginia Corporation, et al.,

Defendants,

and

Albemarle Paper Company, A Delaware Corporation;
Hoerner Waldorf Corporation, A Delaware Corporation;
First Alpaco Corporation; and
Ethyl Corporation, A Virginia Corporation,

Additional Defendants.

MEMORANDUM OPINION AND ORDER

[Filed November 9, 1971]

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

DUPREE, District Judge:—Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless

clarity otherwise dictates, such operation will be referred to as "Albemarle."

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

Findings of Fact

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employment Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the

plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an employer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organiza-

tion within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression." In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail."

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be

filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was affected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of pro-

gression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a 'permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling."

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

	Negro	*White*
A. *Wood Yard Department*		
Yard Crew		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1
Service Crew		
Dempster-Dumper	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0
B. *Pulp Mill Department*		
Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4
Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

	Negro	*White*
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0

C. *A Paper Mill Department*

Paper Machine Line Of Progression		
Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tendeer No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0

D. *B Paper Mill Department*

Machine Tender	0	8
Back Tender	0	8

	Negro	*White*
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0
G. *Boiler Department*		
Boiler Operator	0	4

H. *Power Plant Department*	*Negro*	*White*
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. *Technical Service Department*		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62

	Negro	*White*
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fd the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brokeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department

	Negro	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4

	Negro	*White*
Chip Unloader	1	3
Chipper Operator No. 2		
Chain Operator	0	4
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborer	12	0

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests—the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test—were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was

followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B. Mill Product) lines of progression.

21. The Beta examination is a nonverbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to

assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for en-

trance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection Procedures," Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a

greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line."

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation

to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this test a professionally-developed formula, the "Flesch Readability Index," was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of

the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index," which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites and, in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature.

Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

Conclusions of Law

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d), (e).

4. Plaintiffs have complied with the procedural requirements of Section 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . . ," or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." Subsection (c) of the same sec-

tion defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race* . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race* . . . ." (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful unless there is an overriding legitimate, non-racial business necessity, Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971); Robinson v. Lorillard, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental." See Robinson, supra, at 796 (quoting from Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d at 996, 1 FEP Cases 875, 71 LRRM 3070). Viewed in this light, it is clear that Albemarle

practiced racially discriminatory employment practice prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 431 F.2d 245, 249, 2 FEP Cases 895 (10th Cir. 1970), cited with approval in Robinson, supra.

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority*, unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency

of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); Long v. Georgia Kraft Company, 2 FEP Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court *"may . . .* order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay."* The statute thus speaks clearly in terms of the discretionary power of the court. See Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Company, 304 F.Supp. 1284, 1 FEP Cases 764, 71 LRRM 2427 (N.D.Ind. 1969). Robinson, supra, can be read to hold that back pay is a compensa-

tion for a tangible economic loss and that the plaintiff is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion to *award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in Robinson, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is an equitable remedy. Robinson, 444 F.2d at 802, supra. The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in Robinson, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

Ordered, Adjudged And Decreed

I. Albemarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or participation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negro employees, insofar as such systems may apply to permanent job assignments, and permanent promotions and lay-offs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are

relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability, fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Ap-

pendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will been made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among

themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

It Is So Ordered.

APPENDIX A

Method For Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

Residency Requirements

Wood Yard Department	
Crane Operator (American)	
Crane Operator (Large)	11 mos.
Long Log Operator	9 mos.
Log Stacker Operator	8 mos.
Small Equipment Operator	8 mos.
Bulldozer Operator	6 mos.
Oiler	6 mos.
Chip Unloader	3 mos.
Chipper Operator No. 2	3 mos.
Chain Operator	3 mos.
Chipper Operator No. 1	3 mos.
Tractor Operator	3 mos.
Chip Bin Operator	3 mos.
Laborer	1 mo.
Pulp Mill Department	
Digester Operator (Cooker)	
Stock Room Operator	12 mos.
Stock Room First Helper	12 mos.
Stock Room Second Helper	6 mos.
C. E. Recovery Operator	
1st Helper No. 6	15 mos.
Evaporator Operator (when used)	12 mos.
1st Helper No. 5	12 mos.
2nd Helper	9 mos.
Utility Helper	4 mos.
Caustic Operator	
Lime Kiln Operator	12 mos.
By Products Operator	

Leadloader—Blower	9 mos.
Loader	6 mos.
Power Plant	
Power Plant Operator	
1st Helper	18 mos.
2nd Helper	12 mos.
B Mill Shipping	
Scale Clerk	
Lift Truck Operator	12 mos.
Utility Man	9 mos.
Laborer	3 mos.
Boiler Room Department	
Boiler Operator	
Bark Burner Operator	10 mos.
1st Fireman	9 mos.
2nd Fireman	6 mos.
Laborer	3 mos.
B Paper Mill Department	
Paper Machine Progression	
Machine Tender	
Back Tender	36 mos.
3rd Hand	24 mos.
4th Hand	12 mos.
5th Hand	4 mos.
6th Hand	2 mos.
7th Hand	1 mo.
Stock Room Progression	
Stock Room Operator	
Stock Room 1st Helper	12 mos.
Stock Room 2nd Helper	6 mos.

Technical Service	
Mill Progression	
B Mill Shift Testman	
Additive Man	15 mos.
Laboratory	
General Lab Testman	
General Lab Assistant	15 mos.
Sampleman	6 mos.
Trainee	3 mos.
Service Department	
Payloader	
Dempster-Dumpster Operator	10 mos.
Winch Truck Operator	9 mos.
Truck Operator	9 mos.
Winch Truck Operator Helper	3 mos.
Laborer	1 mo.
Store Room Department	
Storeroom Clerk A	
Storeroom Clerk B	6 mos.
Storeroom Clerk C	6 mos.
Storeroom Clerk D	6 mos.
A Paper Mill Department	
Paper Machine	
Machine Tender No. 1	
Machine Tender No. 2	30 mos.
Back Tender No. 1	26 mos.
Back Tender No. 2	26 mos.
Third Hand No. 1	24 mos.
Third Hand No. 2	24 mos.

Fourth Hand No. 1	12 mos.
Fourth Hand No. 2	12 mos.
Front Plugger No. 1	4 mos.
Back Plugger No. 1	4 mos.
Back Plugger No. 2	3 mos.
A Paper Mill Department	
Beater Room	
Beaterman	
1st Helper	12 mos.
Brokeman	6 mos.
Shipping Room Department A Mill	
Lead Loader	
Lift Truck Operator	12 mos.
Lead Tier and Wrapper	6 mos.
Wrapper, Loader, Laborer	3 mos.

* * *

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District Of North Carolina

Wilson Division

[Title Omitted in Printing]

MOTION TO ALTER OR AMEND THE JUDGMENT ENTERED ON NOVEMBER 9, 1971

[Filed November 22, 1971]

Plaintiffs, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, moves the court to alter or amend the judgment entered in this action on November 9, 1971, insofar as said judgment fails to award plaintiffs their costs of this action and said judgment fails to provide for the retention of jurisdiction by the court for the enforcement of said judgment.

As grounds for this Motion plaintiffs show the court as follows:

1. Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), provides that in any action brought under this title the court, in its discretion, may allow the prevailing party a reasonable attorneys' fee as part of the costs. The only item of costs allowed in the judgment were attorneys' fees. The judgment should be altered or amended to allow not only attorneys' fees but other items of costs recoverable under federal law.

2. The judgment fails to provide for the retention of jurisdiction of this action for a reasonable period to insure compliance by the defendants with its terms. The nature of the claim asserted in this cause and the finding by the court that the effects of racial discrimination engaged in by the defendants were not eradicated as of the date of the entry of the judgment mandates a provision by which the court specially retains jurisdiction of this action for a reasonable period of time to assure compliance by the defendants with the terms of the judgment.

Wherefore, for the reasons stated above, plaintiffs respectfully pray the court to alter or amend its November 9, 1971 judgment to include the matters set forth in this Motion.

This ..... day of November, 1971.

Respectfully submitted,

/s/ .....
Robert Belton

J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
237 West Trade Street
Charlotte, North Carolina 28202

T. T. Clayton
Clayton & Ballance
Post Office Box 236
Warrenton, North Carolina

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina

LETTER FROM THE HON. F. T. DUPREE, JUDGE RE: MOTION TO ALTER OR AMEND

November 22, 1971

Mr. Charles O'Connell
Mr. Rodger L. Nordbye
Mr. J. LeVonne Chambers
Mr. Bonner D. Sawyer
Mr. James B. Ledford
Mr. Julian R. Allsbrook, Jr.
Mr. William L. Robinson
Mr. Conrad O. Pearson
Mr. Charles F. Blanchard
Mr. Warren Woods
Mr. Francis V. Lowden, Jr.
Mr. T. T. Clayton

Re: Civil No. 989—Wilson Division
Moody, et al. v. Albemarle, et al.

Gentlemen:

With reference to plaintiffs' motion to amend the decree of November 9, 1971, in the absence of objection and request to be heard, the final order to be entered when the matter of attorneys' fees has been settled will award costs in the action to the plaintiffs, and in any event will provide for a retention of jurisdiction pending implementation by defendant Albemarle of the injunctive provisions of the decree.

Sincerely yours,

/s/ F. T. Dupree, Jr.
F. T. Dupree, Jr.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, et al.,

Appellants,

v.

Albemarle Paper Company, et al.,

Appellees.

OPINION

[Entered February 20, 1973]

Before Boreman and Bryan, Senior Circuit Judges, and Craven, Circuit Judge.

Craven, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees, and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are *verbal* tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and

paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employee's ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' ratings was: "Excluding a man's attitude, just

how well the guy can do the job when he's feeling right." (A. 471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

[1] Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158 (1971). If an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs*, at 432, 91 S.Ct. 849. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon Albemarle to establish business necessity[2] by showing that its testing requirements

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[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the natural average as determined in a study by the authors of the test. Negro Norms. A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

"have a manifest relationship to the employment in question." *Griggs,* at 432, 91 S.Ct. at 854. United States v. Jacksonville Terminal Co., 451 F.2d 418, 455-457 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436, 91 S.Ct. 849. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs,* at 433-434, 91 S.Ct. 849. We have also recently noted with approval these guidelines. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

[2] We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to

Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative polices or practices which would better accomplish the business purpose advanced, or accomplished it equally well with a lesser differential impact."
Robinson v. Lorillard Corp., 44 F.2d 791, 798 (4th Cir. 1971). *See also,* Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum.L.Rev. 900, 908 (1972).

[3] § 703(a)(2), (h) provides in relevant part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

42 U.S.C.A. § 2000e-2(h).

ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective rating of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e. g.,* Rowe v. General Motors Corp., 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

> should be carefully developed, and the ratings should be closely examined for evidence of bias.
>
> * * *
>
> 29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See,* Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1354-1355 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

[3] Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required

prevents concluding that no significant differences exist in the jobs in question.[4]

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

[4] Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particulalry likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible, 401 U.S. at 432, 91 S.Ct. 849. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay. . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-803. In *Robinson*, as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in United States v. Hayes Int'l Corp., 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the

suit.'" Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1202 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its impostion.

444 F.2d at 804. *See also,* Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, (S.D.Tex., 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district court below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

[5] "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the ***purpose for which the power exists.***" Bowles v. Goebel, 151 F.2d 671, 674 (8th

Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966) Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

[6, 7] Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra* 416 F.2d at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render

such an award unjust.[5] Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). *See Bowe, supra* 416 F.2d at 719-720.

[8] Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

Reversed.

Boreman, Senior Circuit Judge (concurring in part and dissenting in part):

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act. 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the

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[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-611 (E.D.La.1971), aff'd, per curiam, 460 F.2d 1228 (5th Cir. 1972).

federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances"; and second, that failure to grant back pay was an abuse of discretion under Robinson v. Lorillard, 444 F.2d 791 (4 Cir. 1971).

In Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 402-403, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between the provision for attorney's fees and for back pay.

The pertinent provisions with respect to the allowance of attorneys' fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a completely different subsection of Title

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord,* Wooten v. Moore, 400 F.2d 239, 242 (4th Cir. 1968).

[3] Title II, 42 U.S.C. § 2000a-3(b):

> (b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirm-

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[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E. g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1254 (1971).

[6] *See*, Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va.1970).

ative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in Robinson v. Lorillard, *supra* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more inti-

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[7] *E. g.,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931).

mately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) Larson v. United States, 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and good faith attempts to validate its testing procedures[11]—is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated

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[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of discretion.

[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determining the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of Phelps Dodge v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to

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[12] 444 F.2d 791 at 802, 804.

[13] *See*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-1007 (9 Cir. 1972).

> the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198, 61 S.Ct. at 854.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future. . . .
>
> * * *
>
> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of ex-

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[14] The answer was filed on November 22, 1966.

press representations made three and one-half years prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson,* in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson,* but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pretrial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a). F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

ALBERT V. BRYAN, Senior Circuit Judge (dissenting in part, and concurring in part):

I would affirm the District Court's refusal to enjoin the employee testing practices of Albemarle Paper Com-

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defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

pany. However, I would reverse for its deprival of the employees of an opportunity to recover back pay, if any, lost by reason of the practice of fixing seniority on a job instead of a plant basis.

One cannot read the District Judge's opinion without being impressed by its thoroughness, completeness and fairness. Overall, save for the disallowance of back pay just mentioned, I think the opinion honors the dictates of the Civil Rights Act of 1964 and squares with the exactions of the Act as expounded in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

While Judge Craven's recitation of the facts is altogether accurate, I would add this synopsis. A full appraisal of the Court's ruling calls for review of the steps taken by Albemarle to meet the statute's demands. Before the effective date of the Civil Rights Act of 1964, Albemarle commenced recruitment of black applicants from the nearby high schools for participation in the company's apprentice program. It also sought applications from among its black employees.

Following *Griggs,* Albemarle conducted validation studies of its testing requirements. To this end an acknowledged expert in such matters was retained. He gauged his study by the manual, among others, issued August 1, 1970 by the Equal Employment Opportunity Commission, entitled "Guidelines of Employee Selection Procedures." Pursuant to his directions each employee was given three well-known tests, the Wonderlic, Forms A and B, and the Beta. The tests purported to show the employee's capability to do the work assigned him. His performance was thereafter rated twice by two different supervisors, who made independent evaluations without knowledge of his test scores.

The test results and job ratings were sent to Purdue

University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings . . . ."

The expert advised that "the company utilize these tests for its initial hiring," observing, however, that "no test or set of tests will validate for all jobs." With this evidence in mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression." This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related." (Accent added.) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

> "General Summary:

> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.* . . . The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses." It seems to me that these findings necessarily recognize that the equivalent of "job analysis" was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of "requiring applicants to pass two tests for positions where only one test was validated." The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees "with a high level of native intelligence." A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is "demonstrably a reasonable measure of job performance." *Griggs,* at 436, 91 S.Ct. at 856. Thus they are their own proof of their validation. My

understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs,* supra, at 431, 91 S.Ct. 849.

It does not appear from the District Judge's findings that low scores on one or both tests would bar all applicants for employment. Decisions on employment in non-technical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice." Under the Act, 42 U.S.C. § 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then— against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally."

As Judge Craven notes, the District Court found that "Albemarle has practiced racially discriminatory employ-

ment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system." Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally." No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally."

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered."

Conclusion

In sum, as set for in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title Omitted in printing]

ORDER

[Filed June 25, 1973]

Upon consideration of the petitions for rehearing, it appearing that a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original hearing panel, have voted to grant the petitions,

It Is Now Ordered that the petitions for rehearing *en banc* be, and they hereby are, granted. The *en banc* hearing will be scheduled by the Court.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph F. Moody, Theodore Daniels, Henry Hill, and Arthur Mitchell,

Appellants,

versus

Albemarle Paper Company, a Virginia corporation; United Papermakers and Paperworkers, AFL-CIO, and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO, and Albemarle Paper Company, a Delaware corporation, Hoerner Waldorf Corporation, a Delaware corporation, First Alpaco Corporation, and Ethyl Corporation, a Virginia corporation,

Appellees.

Equal Employment Opportunity Commission,

Amicus Curiae.

No. 73-1479

Baxter K. Williams, Albemarle Employment Coordinating Community Development Association, an unincorporated association, and the North Carolina Teachers Association, a corporation,

Appellees,

versus

The Albemarle City Board of Eduaction, a public body corporate,

Appellant.

CERTIFICATE

[Filed December 5, 1973]

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28 U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

> Under 28 U.S.C. § 16 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc?*

The question is of determinative importance in each of the cases.

In *Moody,* two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc,* each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc.* On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay.

In *Williams,* one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc,* he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the suggestion will fail by an equal divison of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc,* because the question of the right of the senior circuit judge to vote arose. The panel had reversed an award of damages by the district court,

but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal, probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges who were members of the intial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-42, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *The Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

SUPREME COURT OF THE UNITED STATES

JOSEPH P. MOODY ET AL. *v.* ALBEMARLE PAPER COMPANY ET AL., and WILLIAMS *v.* ALBEMARLE CITY BOARD OF EDUCATION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73–899. Decided June 17, 1974

PER CURIAM.

Appeals from the judgments of the trial courts in these two cases were heard and determined by two separate three-judge divisions of the Court of Appeals for the Fourth Circuit. Sitting by designation as members of each of the divisions were senior judges of the Fourth Circuit.[1] Following decisions by both divisions, the unsuccessful parties petitioned for rehearings in banc pursuant to 28 U. S. C. § 46 (c): [2]

> "Cases and controversies shall be heard and determined by a court or division of not more than three

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[1] The Court of Appeals for the Fourth Circuit is composed of seven judges in regular active service, 28 U. S. C. § 44, and two judges who have retired from that service but remain available for duties as designated and assigned, known as senior judges. 28 U. S. C. § 294 (b). In *Moody*, both of those senior judges were designated members of the three-judge division which originally decided that appeal; in *Williams*, one of the senior judges was so designated. 28 U. S. C. § 294 (c).

[2] Fed. Rule App. Proc. 35 provides in part:

"(a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain

judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit *who are in regular active service.* A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." (Emphasis added.)

It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate, at 3. Here, their votes are crucial. In *Moody*, while a "majority of the circuit judges of the circuit who are in regular active service" did not vote for a rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing. In *Williams*, while a majority of circuit judges in regular active service did vote for a rehearing in banc, the senior judge who sat on the original division by designation voted against rehearing; with his vote counted the rehearing would fail by an equal division of those voting.

Accordingly, all Circuit judges of the Fourth Circuit in regular active service and both senior judges of the

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uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

Circuit have, pursuant to 28 U. S. C. § 1254 (3), certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc. Because of the importance of the question to the administration of judicial business in the Circuits, as well as to the parties in the two cases pending in the Fourth Circuit, we granted leave to and invited those parties to file briefs in response to the question certified. Upon consideration of the question and the briefs filed by the litigants on both sides of both pending cases, we conclude that the answer should be in the negative; senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc.

The power of courts of appeals to hear or rehear cases in banc was first determined in *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326 (1941). In 1948, Congress provided legislative ratification of *Textile Mills* by enacting subsection 46 (c) of the Judicial Code, which then provided that hearings or rehearings before courts of appeals in banc were to be

> "ordered by a majority of the circuit judges of the circuit *who are in active service.* A court in banc shall consist of all active circuit judges of the circuit." Act of June 25, 1948, c. 646, 62 Stat. 871. (Emphasis added.)

In *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U. S. 247 (1953), the Court had occasion to construe the 1948 statute, and determined that it was a grant of power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing. The Court also addressed itself to the procedure govern-

ing the exercise of this power, holding that each court of appeals was "left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." [3] 345 U. S., at 250. This discretion has been subsequently confirmed. *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688 (1960).

In one of these latter cases, *American-Foreign*, a question arose under the language of the 1948 statute whether, if rehearing in banc was voted, senior judges were eligible to participate in the decision of that case on the merits. The Court held that senior judges were not eligible to sit. Congress in 1963 then enacted the present version of subsection 46 (c), which provides that a senior judge who sat on the original division hearing a case is "competent *to sit* as a judge of the court in banc" in the merits rehearing of the case. (Emphasis added.) But the language of the statute concerning how the court *orders* a rehearing in banc was not changed, except to reinforce the limitation on the grant of power by adding "regular" before "active service," sharpening the definition of which judges may participate in ordering a hearing or rehearing in banc.

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[3] The machinery devised by the Ninth Circuit in that case was one which governed the initiation of the polling of the court to determine whether it should hear or rehear a case in banc. Although there was some uncertainty whether indeed the Ninth Circuit had provided such machinery, 345 U. S., at 263, its nature was to delegate to the three-judge division first hearing the case the power to initiate a poll of the court. *Id.*, at 259. Two of the judges who were members of the division in that case were district judges. *Id.*, at 263. This machinery was similar in kind to that now set forth in Fed. Rule App. Proc. 35 (b), *supra*, n. 2, by which a vote to hear or rehear a case in banc will not be taken unless such a vote is requested by a judge in regular active service, or a judge who was a member of the division that rendered a decision sought to be reheard.

The language of the present statute thus confines the power to order a rehearing in banc to those circuit judges who are in "regular active service." Although, as the Court has held, those judges are largely free to devise whatever procedures they choose to initiate the process of decision to order such a rehearing, and to decide who may participate in those preliminary procedures, see n. 3, *supra*, neither the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc. Obviously such a decision can be reached only by voting. As revealed by the decisional and statutory evolution of the institution of the in banc court, the eligibility of senior judges for participation therein has been the exception, not the rule. We are not at liberty to engraft upon the statute a meaning inconsistent with its historical limitations.

Indeed, the very purpose of the in banc court supports our conclusion that senior judges have not been authorized by implication to participate in ordering a hearing or rehearing in banc. As the Federal Rule indicates, *supra*, n. 2, the in banc court is normally reserved for questions of exceptional importance, or to secure or maintain uniformity of decision within the Circuit. In the wise use of this exceptional power to "determine the major doctrinal trends of the future" for a particular circuit, *American-Foreign, supra*, 363 U. S., at 690, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future workload. Senior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments "without economic incentive of any kind." *Id.*, at 688 n. 4. Consistent therewith, Congress has provided that when a senior judge has participated in the original division hearing, such senior judge may later sit on an

in banc court rehearing that case; this was the purpose of the 1963 amendment to the Judicial Code. But voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration. Congress vested this latter authority and responsibility exclusively in "circuit judges of the circuit who are in regular active service." 28 U. S. C. § 46 (c); because of their different nature, we cannot assume the grant of authority to do one includes authority to do the other.

The question certified to us is therefore answered in the negative.[4]

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[4] The only other courts of appeals which have discussed the issue have ruled similarly. *Zahn* v. *International Paper Co.*, 469 F. 2d 1033, 1040–1042 (CA2 1972) (statements and dissent upon denial of rehearing in banc); *Allen* v. *Johnson*, 391 F. 2d 527, 532 (CA5 1968) (in banc).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, et al.,

Appellants,

v.

Albemarle Paper Company, et al.,

Appellees.

ORDER
Filed July 22, 1974

It appearing from the decision of the Supreme Court in Moody v. Albemarle Paper Co., ... U.S. ....., 42 L.W. 3689 (June 17, 1974) (per curiam), that the order heretofore entered on June 25, 1973, setting this case for rehearing in banc, was improvidently entered, in that only active circuit judges were entitled to vote in the poll on the suggestion for rehearing in banc and a majority of the active circuit judges voted against rehearing in banc;

Accordingly, it is ORDERED that said order of June 25, 1973 be, and it is hereby, rescinded, and the petitions for rehearing and rehearing in banc be, and they are hereby, denied.

/s/ Clement F. Haynsworth, Jr.
Chief Judge